JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD

1967

Chief Justice

THE HON'BLE MR JUSTICE V G OAK

Judges

THE HON'BLE MR JUSTICE J SAHAI
THE HON'BLE MR JUSTICE B DAYAL
THE HON'BLE MR JUSTICE J N TAKRU
THE HON'BLE MR JUSTICE B N NIGAM
THE HON'BLE MR JUSTICE S S DHAWAN (*Retired on 2nd July*, 1967)
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THE HON'BLE MR JUSTICE RAM ASRAY MISRA
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THE HON'BLE MR JUSTICE B D GUPTA
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THE HON'BLE MR JUSTICE G C MATHUR
THE HON'BLE MR JUSTICE GANGESHWAR PRASAD
THE HON'BLE MR JUSTICE S CHANDRA
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THE HON'BLE MR JUSTICE L P NIGAM
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THE HON'BLE MR JUSTICE U S SRIVASTAVA

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THE HON BLE MR JUSTICE A K KIRTY

THE HON BLE MR JUSTICE K C PURI

THE HON BLE MR JUSTICE J S TRIVEDI

THE HON BLE MR JUSTICE D P UNIYAL (*Appointed on 30th September, 1967*)

THE HON BLE MR JUSTICE C B CAPOOR (*Appointed on 30th September, 1967*)

THE HON BLE MR JUSTICE S D SINGH (*Appointed on 4th October, 1967*)

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1967

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Allahabad University Act, (*III of*) 1921 s 29 *St* 205 *Ord* 26 *of Ch VII—Seniority of teachers for holding an office or for membership of Authorities or Bodies of University—Determination of—Substantive appointment, whether includes temporary or officiating appointment*

Substantive appointment (wherefrom the length of service rendered in each rank is to be counted) within the meaning and for the purposes of cl 205 of the Statutes of the University of Allahabad providing for the determination of seniority among teachers for holding any office or for the membership of any Authority or Body of the University means a permanent appointment made under s 29(1) of the University Act It does not include temporary or officiating appointment made either under s 29(3) or under Ord 26 of Ch XII

Wherefore if two lecturers are appointed permanent Readers on the same date the relative seniority between them will rest on and be determined as provided for by cl 205 of the Statutes according to seniority in age irrespective of the period during which they officiated as Readers by virtue of an appointment under Ord 26 of Ch XII on a duty allowance which is valid

Judgment in *Dr S Rafiq Husain* v *Executive Council* holding appointments under Ord 26 of Ch XII invalid not followed on the ground of its being *per incuriam* since the relevant statutory provision was not brought to the notice of the Court

Observation to the contrary in *University of Allahabad* v *Lalshmi Sagar Varshney* held to be a passing reference on the point and unnecessary for the disposal of the case

B M Singh v The University of Allahabad through its Registrar and others 432

Arbitration Act (*10 of*) 1940 *s 30—Indian Limitation Act* (*9 of*) 1908 *Art* 158—*Objection against an award on grounds covered by s 30 of Arbitration Act filed beyond 30 days of the notice of filing the award—Whether capable of being treated and heard as an application for setting aside the award*

Where an objection as indicated in the present case against a judgment being passed in terms of the award raises grounds which fall squarely within s 30 of the Arbitration Act that objection cannot be heard by the Court or treated as an application for setting aside the award unless it is made within 30 days of the Service of notice of the filing of the award as prescribed by Art 158 of the Limitation Act

Madan Lall *v* Sunder Lall and another 428

Banaras State Tenancy Act, (*III of*) 1949 *s* 154—*Stay of application or proceeding' under—Whether extends to a compromise or compromise decree passed in the same—Judgments and Decrees or Orders passed in ignorance of stay of proceedings by or under a Statute—Whether void and a nullity*

The notification no 5198 A/IA—4 67 50 dated 8th October 1955 staying applications and proceedings under s 154 of the Banaras State Tenancy Act does not cover compromise or compromise decree in proceedings under that section and the same cannot as such be said or declared to be void or a nullity

Obiter—Judgments and Orders or decrees passed by a court in ignorance of stay of proceedings by a statute or rule or order made thereunder would be void and a nullity

L Parsotam Saran v *B Brahma Nand* and *Mulraj* v *Murti Raghunathji Maharaj* (S C) distinguished on the ground of their being stay orders passed by a court of law which may not operate till known and which cannot be extended to Statutes taking effect from the date provided or of publication irrespective of actual knowledge

Damri *v* Sarabjit 814

Benami Transaction—*Nature and burden of proof—Sale and lease,—Difference between*

Resulting Trust—*Defendant was permitted to enjoy the fruits of a lease—Resulting trust not created*

The normal rule is that the deed must in the absence of evidence to the contrary prevail according to its apparent tenor Where an allegation of a *benami* character is made the burden of proof lies on the person alleging the *benami* nature of the transaction Mere probabilities or suspicion are not sufficient to displace the apparent nature of the transaction The main points necessary to be looked into for finding out whether a particular transaction is *benami* or not are the source of money the possession of property and the title deed and the conduct of parties before and after the execution of the deed Reliance must be placed not only on the surrounding circumstances and the position of the parties and their relation to one another but also upon the motive which could govern their actions and their subsequent conduct

The legal position of lease is different from a sale Whereas in a lease there is a subsisting contract between a lessor and a lessee inasmuch as there are reciprocal rights and liabilities In the case of a sale the vendor disappears from the scene for all times to come once the sale is complete In the case of a lease

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the performance of reciprocal rights and liabilities continue so long as the lease lasts and it is of absolute necessity that the lessor knows the real lessee in a *benami* transaction for otherwise the real lessee would be relegated to the position of sub lessee

Merely because the defendant was permitted to enjoy the fruits of the lease standing in the name of plaintiffs it cannot be said that there was a resulting trust for the benefit of the defendant

Ram Chand *v* Mota Thad and another 341

Code of Civil Procedure, 1908, *s* 11—*General doctrine of* res judicata—*Applicability and scope—Decision by civil court—If can operate as* res judicata *in suit in revenue court—Former suit and subsequent suit—Whether the date of decision or institution is to be decided*

S 11 C P C is applicable only to cases where both the earlier proceeding and the later proceeding which is said to be barred by the earlier one are civil suits whereas in cases in which neither of the two proceedings or only one of them is a civil one the general doctrine of *res judicata*, shorn of the limitations imposed by s 11 is to be applied

Revenue courts are courts of special limited jurisdiction belonging to an entirely separate hierarchy and cannot be equated with civil courts Therefore s 11 C P C would not apply but the general doctrine of *res judicata* would apply to create the bar

To decide whether a suit is a former suit it is the date of decision and not the institution which has to be considered

Jodhan *v* The Board of Revenue, U P and other 40

——— *s* 11 *Expl IV, s* 146 *O* 22 *r* 4(2)—*Finding on a point directly in issue in former suit—Plea taken up but not pursued in former suit—Whether operates as* res judicata—*Pleas available to legal representative—Whether limited to those open to the deceased*

The finding in the former suit that X and Y were separate and not members of a joint Hindu family would operate as *res judicata* in the subsequent suit So also where the plea of the invalidity of a family settlement was taken but not pursued in the former suit its trial in the subsequent suit will be barred on the principle of constructive *res judicata*

It is not open to the legal heir and legal representative of a deceased party to take any plea which was not available to the deceased There is nothing in Hindu Law to militate against this rule or in s 146 of the Code of Civil Procedure to show that it is inconsistent with and to that extent overides the provision to that effect (the rule aforesaid) made under O 22 r 4(2) of the Code

Ramesh Chandra *v* Musammat Mahadevi and another 76

——— 1908 *s* 92—*Debutter property—Invalid sale by Shebait—Suit by a worshipper for recovery of property sold,—Whether maintainable*

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Where the Shebait or manager is acting adversely to the interest of the temple a worshipper is competent to represent and sue on behalf of the deity for the recovery of the possession of immovable property of the temple from the transferee under an invalid sale on account of its being without necessity or any benefit Such a suit is not covered or barred as such by the provisions of the Code of Civil Procedure

Decision to the contrary in *Kunj Behari Chandra* v *Sri Sri Shyam Chand Thakur* and *Arlatian Alekhagadi* v *Sudersan Mohapatra* holding that the only remedy of the public in such cases lay in a suit under s 92 for the removal of the Shebait and appointment of another who would file the necessary suit over ruled

Bishwanath and another *v* Thakur Radha Ballabhji and others 262

——— 1908 *s* 104 *O XXXIX, r 4 and O XLIII, r* 1(r)—*Discharge of interim order—If appealable under O XLIII r* 1(r)—*S* 104 *if applies to appeal from an Order of single Judge of the High Court to Division Bench—Order granting or vacating an interim order in Writ—If appealable*

A perusal of the various provisions relating to appeals from decrees and orders indicates that the appeals envisaged in the Code of Civil Procedure are appeals from a lower court to higher court and not from one judge of a court to another judge of the same court The judgment of a single Judge of the High Court constitutes the judgment of the High Court Therefore, s 104 has no application to order passed by a single Judge and no appeal would lie under O XLIII r 1(1) against such an order

Order granting or vacating an interim order in a pending writ petition does not amount to a judgment and is therefore not appealable under cl 10 of the Letters Patent

Gopal Behari Kapoor v District Magistrate Etah and others 531

——— *O X, rr* 1 *and* 2—*Statement under—Difference between —O X, r* 2—*Statement under—Statement made inadvertent by by the counsel—Whether, binding on the party—Court can consider the matter*

There is a clear difference between a statement under r 1 and one under r 2 of O X of the Code of Civil Procedure There is no limitation in r 2 that the questions must be limited to the allegations specifically made in the pleadings R 1 is confined only to ascertainment from the party—or his pleader R 2 provides for examination not only of the party or the pleader but also a companion of the party that is any person by whom a party or its counsel is accompanied The statement under r 2 of a person accompanying the party without any authority or power on his behalf cannot occupy the same position as the statement of the party or his pleader made under r 1 Admissions made by a party under r 1 are conclusive against him A statement under r 2 would be of great value and has to be considered in the decision of the case.

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The statement under O X r 2 does not stand on the same footing as the statement under O X r 1 and the question whether a particular statement made under O X r 2 would or would not bind the party concerned can be considered by the courts and when they come to the conclusion that the statement was made by the counsel inadvertently that statement made in advertently could not be said to be binding on his clients

Balmiki Singh v Mathura Prasad and others 547

——— O 21 r 90(1) *Proviso* (b) (*as amended in* 1957)—*Deposit of money or furnishing of security stage— Entertain —Meaning of—Application for fixation of amount—Necessity of—Procedure*

Appeal—*Application under* O 21, r 90(1)(*b*) C P C *rejected for non compliance—Appeal, if lies—Code of Civil Procedure,* O 43 r 1(*j*)

When the Proviso declares that the application shall not be entertained unless the applicant complies with cl (*b*) it refers to the point of time when the application is taken up by the Court for judicial consideration in order to act upon it and in a proper case to require the respondents to show cause against the application being allowed on the grounds contained in it Before that stage is reached the applicant must comply with the order made by the court under cl (*b*)

Upon an application being filed under O 21 r 91 the Court must call upon the applicant to establish whether the requirement of cl (*b*) should be dispensed with and if not what according to him should be the amount of deposit or the security to be furnished

An order rejecting an application for setting aside sale even if the rejection is on the ground of non compliance with cl (*b*) of the Proviso to r 90(1) of O 21 is nevertheless an order to set aside a sale and therefore appealable under O 43 r 1(*j*)

Lallamal Hardeo Dass Cotton Spinning Co Mathras v Sukh Dial Ram Bilas and others (F B) 724

——— O 23 r 3—*Application for withdrawal of suit after issues and some evidence adduced—Whether and when to be allowed*

In the absence of any right having vested in the defendant to continue the suit e g passing of a preliminary decree for rendition of accounts or specific case of set off or counter claim the plaintiff has subject to his liability for costs to the defendant the unqualified right to withdraw the suit at any stage (in this case after the issues had been framed and some evidence had been led in the case) provided he does not seek to do so with permission to file a fresh suit

A defendant cannot be said to have claimed a set off or set up a counter claim where he alleges in his written statement to the suit for rendition of accounts that accounts had been fully explained to the plaintiff wherein a certain sum of money had been found due to him from the plaintiff that there was no occasion for rendition of accounts and that the suit was not fit to proceed according to law and pleads simply that if the Court

has jurisdiction and rendition of accounts be found necessary a decree for such amount as may be found due to the defendant from the plaintiff may be passed in his favour together with costs and interest

Hulas Rai Baij Nath v. K. B. Bros & Co 663

Code of Criminal Procedure, 1898 s 59(1)—*Power of a private person to arrest one who in his view commits a non bailable and cognizable offence—Whether limited in point of time to the commission of the offence*

The power of a private person under s 59 of the Code of Criminal Procedure to arrest another who in the view of that person commits a non bailable and cognizable offence is confined to the time when or immediately after which such offence is committed and/or thereafter in the course of a pursuit undertaken immediately after the commission of the offence It does not extend to any time afterwards even though no such pursuit had been undertaken or if undertaken had been given up

Vishwa Mitra Sharma v Suresh Chand and others 373

——— 1898 *ss* 144 *and* 188—*Constitution of India* (1950) *Arts* 19 *and* 141—*Provisions of ss* 144 *and* 188 *of the Code whether unconstitutional—Binding effect of the law declared by the Supreme Court*

The Supreme Court decision in *Babu Lal Parate v State of Maharashtra* and other cases not only cover the point that s 144 of the Code of Criminal Procedure in view of the wide amplitude of the power it confers on certain Magistrates does not impose unreasonable restrictions on certain fundamental rights so as to render it unconstitutional and void but also saves the constitutionality of the portions thereof relating to the assumption and exercise of power in respect of public tranquility which though not synonymous with is included within the expression and import of public order provided for by Art 19 of the Constitution

Even if it be possible to contend—which is not accepted—that the latter portion of the law stated above was not specifically raised before or directly and necessarily decided by the Supreme Court it would nonetheless be binding on all the Courts in India as clearly laid down by Art 141 of the Constitution

The provisions of s 188 are constitutional and cannot be held to be *ultra vires* There is no inconsistency between the provisions of ss 144 and 188 of the Code and if there be some it cannot render the latter unconstitutional It is true that s 188 requires for punishability acts like riot or affray which are not covered by Art 19 of the Constitution but those acts are in addition to the violation of an order under s 144 which is constitutionally sufficient for the purpose of the liability and as such only militate against the rigour of the permissible range of punishment

Ram Manohar Lohia v State of U P and others 595

——— *as amended by Act* (*XXVI of* 1955) *ss* 145, 146 *and* 435 *to* 439—*Proceedings under s* 145—*Reference to Civil Court under s* 146—*Magistrate disposing of proceeding in accord*

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ance with the findings of the Civil Court—Magistrate's order —If revisable by the Sessions Judge or the High Court— Respective scope of—ss 435 to 439

The words the records of which has been called for by itself or which has been reported for orders occurring in s 439 of the Code refer to the provisions in ss 435 to 438 of the Code and will therefore refer to any proceeding which is not of such a court A proceeding before the civil court arising on a reference under s 146 cannot be said to be a proceeding of a Criminal Court so as to attract the Code Consequently an order under sub-s (1 B) of s 146 of the Code by the Magistrate disposing of the proceeding under s 145 of the Code would not be amenable to the revisional jurisdiction under s 439 of the Code if it is in conformity with the finding of the Civil Court

Guru Prasad Pandey *v* State and others 386

——— 1898 *s 195—Court—Rent Control and Eviction Officer—If a court under s 195 Cr P C—U P (Temporary) Control of Rent and Eviction Act and 199 I P C*

The Rent Control and Eviction Officer is only an authority who has been invested with certain powers of a civil court for carrying out the purposes of the Act He exercises quasi judicial powers and is not a court as contemplated by s 195 Cr P C and consequently a complaint by the Rent Control Officer was not required for proceeding under ss 193 and 199 I P C

Des Raj *v* State 230

——— *s 195(1)(b)—Bar against cognizance of certain offences without a complaint from the Court concerned—Point of time or stage at which applies*

If a private person aggrieved by the information given to the police files a complaint for commission of an offence under s 211 I P C i e false charge of an offence or any other offence of the kind at any stage before a judicial order has been made by a Magistrate there can be no question of the provisions of s 195(1)(b) Cr P C being attracted and the necessity therefore of a complaint by any Court because on that date there would be no proceeding in any Court in existence in relation to which the said offence can be said to have been committed The mere fact that on a report being made to the police of a cognizable offence the proceedings must at some later stage end in a judicial order by a Magistrate cannot stand in the way of a private complaint under s 211 being filed and of cognizance being taken of the same by the Court

M I Sethi *v* R P Kapur and another 179

——— 1898 *s 197—Complaint against public officer—Sanction—Necessity of—Act constituting the offence when within the ambit of official duty—Question of the necessity of sanction—If to be decided before cognizance is taken—Complaint alleging assault on a witness by police officer to obtain statement—Sanction, if necessary*

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In order that an act of a public servant may fall within the ambit of his official duty it must be shown that it was committed in the discharge of his official duty There must be a reasonable connection between the act and the official duty It does not matter if the act exceeds what is strictly necessary for the discharge of the duty as this question would arise at a later stage when the trial proceeds on the merits

It is no part of the duty of a police officer to assault a witness or an accused in order to obtain a statement from him It is equally not so to put a person under unlawful restraint to extort a confession as none of them can be said to have any connection with the official duty of a police officer and consequently sanction in such a case is not necessary

The question of the necessity of a sanction may arise in the course of the trial Therefore the absence of sanction does not debar the cognizance of a complaint

Ram Nath *v* Salig Ram Sharma 11

———*S* 197—*Indian Penal Code (Act XLV of)* 1860 *s* 218—*Prosecution of Lekhpal under s* 218 *I P C in respect of Khasra entries—Whether prior sanction of Governor necessary—Essentials of offence under s* 218

In preparing the Khasra the Lekhpal no doubt acts in his official capacity and in the discharge of public duties as a public servant To that extent the case is duly covered by the provisions of s 197 of the Code of Criminal Procedure In view however of the fact that the power of dismissal from service of a Lekhpal which is implicit in the power of appointment vests in the Assistant Collector the other condition of that section is not fulfilled

A Lekhpal may therefore be prosecuted of an offence under s 218 I P C regarding Khasra entries without the prior sanction of the Governor

A Lekhpal is not required to make a detailed enquiry at the time of *patal* and as such in order to sustain his prosecution under the aforesaid section it will not suffice to prove that the entries were wrong or as a result of negligence It is necessary to establish the requisite dishonest intention on the part of the Lekhpal to secure his conviction

Sita Ram *v* State 454

———, 1898 *s* 417—*Appeal against acquittal—Extent of the power of High Court in*

The powers of the High Court in an appeal from an acquittal are in no way differt from those in an appeal from a conviction The High Court can consider the evidence and weigh the probabilities It can accept evidence rejected by the Sessions Judge and reject evidence accepted by him unless the Sessions Judge relied upon his observations of the demeanour of a particular witness In departing from the conclusions of the Sessions Judge the High Court must pay due attention to the grounds on which the acquittal is based and repel those grounds satisfactorily bearing in mind always that the accused starts with a presumption of innocence in his favour and this presumption cannot be

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less strong after the acquittal If these matters are properly kept in mind and acquittal is reversed there can be no objection be cause the High Court is empowered by law to reverse an acquittal

Sher Singh and others *v* State of U P 293

——*Ss 476 and 479 A—Applicability of—Witness not appear ing before the Court and only filing affidavit—S 479 A or s 476 applies—S 479 A(1) not applicable—If cl (6) thereof will apply*

Before s 479 A can apply it is incumbent on the Court o form an opinion that a particular witness appearing before it gave false evidence It is therefore absolutely essential that the witness in question must appear in person before the Court Where therefore a person files a false affidavit only and does not appear before the Court as a witness the procedure under s 479 A would be inapplicable and the case would be governed by s 476 Cr P C

Where s 479 A itself is inapplicable the bar under cl (6) thereof cannot be invoked

Gopalji Brahmachari *v* Parshottamchari 290

——*Ss 488 488 and 439—Order in proceedings for main tenance—Whether subject to revisional power of the High Court*

An order in proceedings for maintenance under s 488 of the Code of Criminal Procedure is subject to the revisional power of the High Court under s 439 of the Code The doubt or the point has now been set at rest by the amendment in s 488 made by Act no 39 of 1956

Subhwanti *v* State 472

Constitution of India, *Art* 226—Mandamus— Mandamus *if can issue to a trading corporation—Duty of public nature—Office of public nature—Meaning and import of—Nature of the office of Labour Welfare Officer—Specific Relief Act* 1877 *s* 45

Art 226 of the Constitution is very wide and empowers High Courts to issue a writ to any person which word includes a company registered under the Companies Act High Court is empowered to issue not only well known prerogative writs but also to issue any order or direction according to the neces sities of a case *Mandamus* may issue to a trading corporation to compel it to do its duty which is of a public nature and to restore a person to a corporate office if the office is of a public nature

A duty is of public nature if it is imposed by Charter Com mon law or statute

The office is of public nature if it is created by a statute and the duties of the office affect the general public or a section thereof

The office of the Labour Welfare Officer is a public office

Synthetic and Chemicals Ltd *v* G C Kumar and others 325

——*Art* 226—*Code of Civil Procedure* 1908 *s* 141 *O* I *rr* 1 *and* 2—*Nature of proceedings under Art* 226—*Whether*

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civil proceedings—Applicability of O 1 r 1 C P C—Joinder of more than one petitioner when permissible

An application under Art 226 of the Constitution is a proceeding in a Court of civil jurisdiction if it relates to a Civil matter and as such the provisions of O 1 r 1 of the Code of Civil Procedure do apply to such a proceeding but only to the extent they are not inconsistent with the nature of the proceeding Thus the joinder of more than one person under Art 226 can be permitted only where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction the petitioners are jointly interested in the cause or causes of action

OAK C J —An application under Art 226 of the Constitution involving civil rights is a proceeding in a court of civil jurisdiction So the provisions of O 1 r 1 C P C are applicable to such a proceeding Even if we assume that a writ petition is not a proceeding in a court of civil jurisdiction and O 1 r 1 C P C in terms does not apply to such a proceeding more persons than one can join in a petition under Art 226 of the Constitution under circumstances in which persons more than one can join as plaintiffs in a suit in accordance with the provisions of O 1 r 1 C P C

Since the High Court exercise civil jurisdiction under Art 226 s 141 C P C is attracted Consequently the procedure provided in the Code of Civil Procedure in regard to suits has to be followed as far as it can be made applicable

Mal Singh and others v Laksha Kumari Khaitan and others (F B) 882

——— *Art 311(2)—Revision from officiating higher post for unsatisfactory performance—Not a reduction in rank*

Where a government servant is given a chance to officiate on a higher post it is implicit in the promotion that he would be reverted on account of unsatisfactory performance Therefore unless the servant had a right to the post he cannot complain that he was deprived of a position to which he was legally entitled Termination of officiating trial chance does not amount to reduction in rank where no right to the post existed In such cases notice for termination is not material

Where a reversion affects the chances of future promotions it is a question to be decided on the facts of each case

Rajendra Swarup Sharma v The General Manager N E Railway 240

——— *Art 311(2)—Proviso (a)—Termination of employee's services on conviction—No opportunity to show cause given—Appeal against order of conviction allowed*—Held *employee entitled to benefit of Art 311(2)*

Where the services of an employee were terminated on his conviction by a Special Judge (Anti Corruption) without affording him any opportunity to show cause as provided in Art 311(2) but

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subsequently the employee's appeal against his conviction was allowed *held* that the respondents would not be entitled to the benefit of sub-cl (a) of the proviso to Art 311(2) and that the employee is entitled to the protection of cl (2) of Art 311 of the Constitution

Kunwar Bahadur v The Union of India and others (F B) 1 2

Contract—*Constructive or Quasi—Obligation under—Doctrine of unjust enrichment—Order for compulsory retirement passed against the plaintiff—Order challenged—Stay order by High Court and subsequently by Supreme Court in an appeal therefrom—Plaintiff received full pay during the operation of stay order—Decision against the plaintiff in both the Courts—Plaintiff must refund the money so received—Obligation under constructive contract—Doctrine of unjust enrichment—Indian Contract Act 1872 s 72—Do not apply*

Though there was not be an express contract between the plaintiff and the defendants to refund in the event of his losing the case the amount which was paid by the defendants to the plaintiff as a result of the order of the Court in view of the ultimate decision of the Court the amount became refundable and if the plaintiff is allowed to retain that amount it will amount to allowing him to enrich himself unjustly at the expense of the defendants Therefore on the principle that a man ought to do what the law supposes him to have promised to do the plaintiff must refund the amount on the basis of a constructive implied or quasi contract S 72 of the Indian Contract Act 1872 does not apply in the present case because the amount was neither paid by mistake nor under coercion but was paid under the orders of the court

The plaintiff against whom an order for compulsory retirement was passed continued to receive his pay as a result of the stay order passed by the High Court in a writ petition and subsequently by the Supreme Court in an appeal therefrom is bound on his losing the case to refund the amount so received not under s 72 Indian Contract Act but on the principle of obligation under constructive or implied contract based on the doctrine of unjust enrichment

Shyam Lal v The State of Uttar Pradesh 129

Court Fees Act, 1870 ss 6 B 7(iv 4) 12 *and* 28 *Sch II, Art* 17(iv)—*Sale deed, if an instrument securing property under* s 7(iv 4)—*Suit seeking a declaration that a sale deed was unauthorised, void, illegal and ineffective if involves adjudging void or voidable as contemplated in* s 7(iv A)—*Applicability of* s 7(iv A) *to such suits—Finality under* s 12 *if relates only to valuation alone or also covers the question of court fee—Omission of a revision under* s 6 B—*Effect—Whether appellate court can demand deficiency on plaint—If so the effect of failure to comply*

The expression securing in s 7(iv 4) connotes making safe or certain and has the same connotation in relation to all things mentioned in the section and consequently bears a similar con

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notion in relation to other property having such a due Therefore a sale deed is an instrument securing property within the meaning of s 7(iv A) of the Act A suit seeking relief for declaration that a sale deed was unauthorised void illegal and ineffective involves adjudging void or voidable the sale deed as contemplated by s 7(iv A) and therefore such a suit falls squarely within the section and as such the provisions of Art 17(iii) of Sch II of the Act would not be attracted

The finality declared by s 12 of the Act is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls Therefore the finality would not attach to a decision or order on the question of court fees Nor such a finality would arise because of the omission by the Chief Inspector of Stamps to file a revision under s 6 B of the Act against the decision or order

Where the court fees paid on the plaint was insufficient the plaint would be invalid and therefore the appellate court has to determine the validity of the plaint and where the appellate court finds that there was a deficiency it has power under s 28 of the Act to direct the payment of the deficient court fee

Kanj Behari Lal *v* Sagun Chand and others (F B) 478

——— *(VII of 1870) as amended in its application to U P sub ss (iv)(a) (iv A) and (iv B)(b) of s 7—Suit for injunction based on alleged invalidity of Acts imposing cess and purchase tax on sugarcane—Court fee payable on*

In a suit for injunction restraining the Government from realising sugarcane cess and purchase tax on the alleged invalidity of the Acts imposing them, it could not be said that those Acts were instruments within the meaning and for the purposes of court fee under s 7(iv A) of the Court Fees Act It could not be placed under s (iv)(a) either because it was not a suit for declaration with the consequential relief of injunction The suit would come within and be liable to payment of court fee under s 7(iv B)(b) of the Act

Vishnu Pratap Sugar Works (P) Ltd *v* Chief Inspector of Stamps U P 768

Defence of India Act, 1939 *s 19(1)(f) and Constitution of India Art 136—Appeal to High Court against order of arbitrator—Special leave against the High Court's decision can be granted*

In deciding an appeal under s 19(1)(f) of the Defence of India Act 1939 against an order of an arbitrator the High Court functions as a Court and not as a designated person and the decision by the High Court is a determination Hence it is within the competence of the Supreme Court to grant special leave under Art 136 of the Constitution against such a decision

The Collector Varanasi *v* Gauri Shankar Misra and others 810

Easement—*A Coparcener of joint land owning a house exclusively and flowing water therefrom on coparcenery land—If can claim easementary right—His right if 'as of right'*

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Where a person owning a house exclusively flowed water thereof on a land owned by several persons including himself and a dispute having arisen he filed a suit among others claiming a right of easement of flow water on the coparcenary land *held*, that he could claim the easement right as of right not withstanding that he was one of the owners of the servient tenement

Mahraj Singh v Balpit Singh 34

Fatal Accidents Act, 1855 *s 1A—Damages Conditions for the award of—Deceased not earning wages at the time of death —Considerations for and determination of damages in such a case*

The damages that are allowed under the Act are for the loss of the pecuniary benefits which the plaintiff would have got from the deceased if the latter had not died In estimating the loss the age of the deceased his expectation of life the condition of his health his habits etc are relevant considerations for ascertaining his earning capacity Damages by way of *solatium* is however not contemplated

It is not a condition precedent for the award of damages that the deceased should have been earning an income on the date of death Not need there be specific evidence of pecuniary advantage actually derived even prospective loss can be taken in to account.

Thus the quantum of damages, circumstances of family deceased's position in the family his mental and physical equipment his age as well as the age of the claimant standard of living of the family are the necessary considerations

Shiv Prasad Gupta Agarwal v S M Sabir Zaidi 249

General Rules (Criminal), 1957 *r 6—An Advocate—If can act on a mere memorandum of appearance in a criminal case*

Under r 6 of the General Rules (Criminal) 1957 an advocate may act on behalf of a party in a district criminal court merely on his filing a memorandum of appearance It is not necessary for him to file a *vakalatnama* A pleader or a Mukhtar however is required to file a *vakalatnama*

Lal Singh and others v State 1

Hindu Law—*Suit by or against Karta—Whether binds coparceners—Family settlement by life owner for her and on behalf of minor reversioner, where she is not the natural guardian and contracts to enlarge the life estate at the cost of the reversioner,—Whether binds the minor*

According to the principles of Hindu Law a Karta particularly the father under the Mitakshara School of Hindu Law can sue and be sued in his own name in respect of rights and interests of the joint Hindu family or in respect of transactions entered into in his own name Such a decision would bind the coparceners and they cannot reagitate the same matter by a fresh suit

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A family settlement entered into by a limited owner for her and on behalf of the minor coparcener would not bind the latter where she was not the natural guardian of the minor and the settlement purported to enlarge the life estate in the case of the reversionary interest

Ramesh Chandra v Musammat Mahadevi and another 76

Hindu Succession Act, 1956 s 14(1)—*Nature of Hindu widow's interest in joint family property—Widow's right of alienation of such property*

The interest to which a Hindu widow became entitled on the death of her husband under s 3(2) of the Hindu Women's Right to Property Act 1937 in the property of the joint family was indisputably her property within the meaning of s 14 of Act 30 of 1956 and when she became full owner of that property she acquired a right unlimited in point of user and duration and uninhibited in point of disposition

Held that a male member of a Hindu family governed by the Benares School of Hindu Law is undoubtedly subject to restrictions *qua* alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of the Hindu Succession Act is not subject to any such restrictions

Sukh Ram and another v Gauri Shanker and another 869

Indian Evidence Act, 1872 s 9—*Identification parade—Idea and purpose of—*

Identification Evidence—*Standard of judging—Identification of accused arrested on spot and accused arrested long after the crime—Evidentiary value of—Investigation by S O who took active part in the raid—Effect of*

The whole idea of a test of identification parade is that witnesses who claim to have seen the culprits at the time of the occurrence are to identify them from midst of other persons without any extrinsic aid The identification test is usually adopted during the investigation of a crime by the police when the witnesses are interrogated for the first time and state that they had seen some persons committing the crime but do not know their names and would be able to identify them if they would see them again The identification test is a check upon their veracity These proceedings are in the nature of tests and the courts regard them as facts which establish the identity of anything or person The facts are to be proved according to law and in the absence of such proof the identification proceedings are valueless The fact if proved can be used both for purposes of corroboration as well as for contradiction

The standard of judging the identification evidence of the persons arrested on the spot would be quite different from the general identification normally held of the culprits arrested long after the crime In the latter case the witnesses are required to identify the accused whom they saw committing the crime Proper identification would depend on numerous factors such as one's power of observation distance time and light etc The result would also be affected if the identifica

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tion held long after the incident but in the case of arrest on the spot the identification would be directed mainly to test the credibility of the witness who actually helped or effected the arrest In such a case the attention of the witness would be solely concentrated on the person arrested If several culprits are arrested by different persons it is not necessary that such a witness must know about all the arrests So even if some mistakes are committed in the identification of others that would not detract from the value of evidence of such a witness For all these reasons it would not be necessary to assess the value of such identification on the basis of the results of earlier identifications held in respect of the persons not arrested on the spot

The mere fact that the investigation was done by the Station Officer who took active part in the raid was not sufficient to condemn the prosecution case outright though certainly it would have been advisable if the investigation had been done by some other independent agency

The State of U P v Jugnoo and another 502

Income Tax Act, *(XI of* 1922 s 4—*U P Encumbered Estates Act XXI of* 1934 s 27—*Receipt of Encumbered Estates Bond—Whether amounts to receipt of money payable on receipt thereunder—Taxability of*

If commercial assets are received—be it under a consensual arrangement or by operation of law—by a trader maintaining accounts on cash basis in satisfaction of an obligation income which is embedded in the value of the assets is deemed to be received the receipt of income is not deferred till the asset is realised in terms of cash or money

By issuing the Encumbered Estates Bond to the creditor the Government undertook a fresh obligation in substitution of the original liability of the debtor which thereupon stood extinguished The Government had no doubt the right to recover the amounts due under the bond from the landlord (debtor) but the Government did not on that account become agent of the landlord for payment of the debt its liability to the holder of the bond being independent of its ability to recover the same from the landlord

Accordingly the receipt of the Encumbered Estates Bonds is tantamount to receipt of income in that very year so as to be taxable in the following assessment year irrespective of the period of the realization of money in lieu of the same

Raja Mohan Ram Bahadur v The Commissioner of Income-tax U P 749

——S 23(3)(a)—*Tax liability of partners of a registered firm—Tax assessed on or due from one partner—Whether recoverable from another partner*

The contractual obligations of a firm are no doubt enforceable jointly and severally against the partners but that principle or rule cannot be extended to their tax liability which is statutory and must be limited accordingly

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Where assessment of a registered firm is made and the income of each partner is assessed under s 25(5)(a) of the Income Tax Act the tax assessed on or due from one partner cannot there being no provision in the Act to that effect be recovered from any other partner The provisions of s 44 of the Act and the cases thereon would be of no avail to assessments under s 23(5)(a)

The Income tax Officer Agra v Radha Krishan 759

Indian Limitation Act, 1908 s 19—*Acknowledgment of Debt Loan of Rs 7 000 advanced by the plaintiff to the defendant in January 1947—Defendant executed a receipt on 1st April 1948 in lieu of principal amount originally advanced—Amount being still outstanding on 1st April, 1948 and there being no novation of contract either on 1st April 1948 or on 1st April 1950—Whether receipt amounts to valid acknowledgment within s 19 of the Act*

Where assuming that a loan of Rs 7 000 was made by the plaintiff to the defendant in January 1947 and the defendant on 1st April 1948 after paying Rs 700 as interest on the principal amount executed a receipt in lieu of principal amount originally advanced in January 1947 the amount being still outstanding on 1st April 1948 and there being no novation of contract either on 1st April 1948 or on 1st April 1950 (when the cause of action is said to have accrued) which had the effect of completely discharging the previous debt and the receipt dated 1st April 1948 says

> mublig 7 000 rupya jeske nisf 3 500 hote hain mahajan saheb mausoof se wasul paya aur muzwza promote wasool paya likhza raseed likh dia ki sunad rahe

Held on the assumptions indicated above being established the receipt amount to a valid acknowledgment within the meaning of s 19 of Limitation Act 1908

There is no real inconsistency between *Govind Singh* v *Bijai Bahadur Jagannath* v *Kn Ciruar Singh* and *Gulam Murtaza* v *Mst Fasrunnissan Bibi* in respect of the position that a receipt may serve other conditions being satisfied as an acknowledgment of the earlier debt and extend the limitation for suit based on the earlier debt

Florence Misra v Daulat Ram Ruchi Ram Chablani and others (F B) 867

——— 1908 *Sch I Arts* 91 *and* 141—*Invalid alienation by a Hindu widow—Suit by reversioner after death of widow—Whether barred by 3 years' rule of limitation as to cancellation of instruments*

It is not necessary for a reversioner to seek declaration or cancellation of an unauthorised or illegal alienation by a Hindu widow during her lifetime It is open to him to wait till her death when the reversion vests in him and then to sue for the recovery of the property in question Such a suit will be subject to 12 years rule of limitation under Art 141 and not to that of 3 years under Art 91

Ramesh Chandra *v* Musammat Mahadevi and another 76

——— 1908 *Art* 164—*Application for setting aside* ex parte *decree where summons not duly served on defendant—Limitation for—Starting point of*

The expression knowledge of the decree whence the limitation for the application for setting aside of the *ex parte* decree by a defendant not duly served with summons must be counted means the knowledge of the particular decree which is sought to be set aside and not merely some vague information that some decree had been passed against him It is a question of fact in each case whether the information received by the defendant is sufficient to impute to him knowledge of the decree within the meaning of Art 164 of the Limitation Act

Panna Lal *v* Murari Lal 406

Indian Penal Code, 1860 *ss* 300 *and* 34—*Injury by* pharsa—*Sufficient in the ordinary course of nature to cause death—Case covered by cl* 3 *of s* 300—*Common intention—Liability of other accused under s* 302/34 *I P C*

It is immaterial whether accused had an intention to cause the death of the deceased or not for the injury by *pharsa*, which he caused happening to be sufficient in the ordinary course of nature to cause death his case is covered by cl 3 of s 300 I P C and he must be held guilty of the offence punishable under s 302 I P C

If the person who used the *pharsa* himself did not intend to cause the death but still he has been held guilty of the offence under s 300 I P C punishable under s 302 I P C the other two who shared a common intention with him to cause that injury and which was in fact caused in furtherance of that intention also have to be held guilty of that offence punishable under s 302, I P C, with the aid of s 34 I P C

Ratti Pal and others *v* State 360

——— s 307—*Ingredients of the offence—Causing of hurt by gun—If necessarily raises a presumption of an intention to cause death—Causing of hurt—If material—Facts which the prosecution has to establish*

An offence under s 307 I P C can be made out only when the accused fires the gun at the complainant with the intention to murder him Mere fact that a gun has been used for causing injuries will not necessarily bring the case under s 307 There can be no presumption of intention to cause death because firearm was used to cause hurt

The intention however may be established either from the nature of the act committed or from the surrounding circumstances The prosecution has to establish that the nature of injuries were such as was sufficient in the ordinary course of nature to cause death or imminently so dangerous as to cause death and further the intention or knowledge of the accused If the intention is proved the fact that no injury was caused was immaterial

On the facts of the case *held*, that no offence under s 307 was made out

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Bhagwandin and others *v* The State 160

Interim Order—*Result of*

It is well settled that an interim order merges in the final order and does not exist by itself So the result brought about by an interim order would be *non est* in the eye of law if the final order grants no relief The grant of interim relief when the petition was ultimately dismissed could not have the effect of postponing implementation of the order of compulsory retirement

Shyam Lal *v* The State of Uttar Pradesh and others 129

Prevention of Cow Slaughter Act, 1955 (*Act I of* 1956)—*Ss* 3 *and* 8—*s* 3—*Word "Slaughter" meaning of*

The word slaughter in s 3 of Prevention of Cow Slaughter Act 1955 does not mean merely killing or finishing life in the animal It also covers the numerous incidental and necessary process for turning it into a state in which it can be used for purposes of food These necessary processes in the case of a killed animal are skinning the dead body dismembering its parts from the body and cutting the body into smaller pieces for being cooked

Bhondoo and others *v* State 257

Provident Fund Act, 1925 *S* 3(1)—*The aforesaid amount can not be deducted from the Provident Fund of the plaintiff*

Interest—*Cannot be allowed by way of damages for wrongful detention of money*

S 3(1) of the Provident Fund Act 1925 gave complete protection during the lifetime of the subscriber against the creditors and also against the Government thus the amount received as salary during the operation of stay order by the plaintiff cannot be deducted from his provident fund in spite of the fact of his giving such undertaking before the Supreme Court and embodied in the stay order In the absence of any contract express or implied or any provision of law to justify award of interest interest cannot be allowed by way of damages for wrongful detention of money

Shyam Lal *v* The State of Uttar Pradesh and others 129

Representation of the People Act, 1951 *s* 87 *proviso* 100(1) *(b)*—Corrupt practice—*Corrupt practice committed by the rival candidate i e respondent no* 10 *who was set up by the returned candidate i e respondent no* 1—*No allegation that it was so committed with the consent of the returned candidate—Presumption of consent cannot be inferred with regard to corrupt practice—Issue regarding corrupt practice committed by respondent no* 10 *not material*

In order that the election may be declared void on account of a corrupt practice committed by the rival candidate i e respondent no 10 who was set up by the returned candidate i e respondent no 1 this corrupt practice must be declared to have been committed by him with the consent of the

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returned candidate or with the consent of his election agent The mere fact that respondent no 10 was set up by respondent no 1 does not necessarily mean that any corrupt practice committed by respondent no 10 must have been committed by him with the consent of respondent no 1 or latters election agent There can be no presumption that respondent no 10 was an agent with the consent of respondent no 1 for the purpose of committing a corrupt practice

The issue of corrupt practice, committed by respondent no 10 is not material for the purpose of the case for even if it is found that the alleged corrupt practice was committed by respondent no 10 there being no allegation that it was committed with the consent of respondent no 1 no evidence would be allowed to be led that it was so

Krishna Behari *v* Jitendra Bahadur Singh 535

Res judicata—*finding given against a party in a litigation which terminated in his favour—Whether that finding operates as* res judicata *in a subsequent litigation—Finding in earlier suit not necessary for the disposal of that suit—Earlier finding does not constitute* res judicata *in a subsequent suit*

A finding given against a party in a litigation which terminates in favour of that party cannot operate as *res judicata* in a subsequent litigation in which arises a similar controversy

Where the earlier suit under s 180 of the U P Tenancy Act was dismissed on the ground that the case put forth by the plaintiff respondent that the defendants-appellants had taken possession as trespassers was incorrect and in fact the appellants were in possession in accordance with the deed Ex A 3 If the Court even after coming to the abovementioned conclusion proceeded to decide as to what would be the right of the appellants under the deed Ex A 3 then certainly such a finding would not operate as *res judicata* in a subsequent proceeding under s 202 of Z A and L R Act between the same parties for the simple reason that it was hardly necessary for that finding being recorded in the earlier suit

Held whether or not the defendants appellants have acquired hereditary rights by virtue of their possession in accordance with the deed Ex A 3 is open for decision in this litigation under s 202 of Z A and L R Act notwithstanding the finding recorded against them in the earlier suit under s 180 of the U P Tenancy Act

Sital Din and others *v* Deoki Nandan and others 679

U P Agricultural Income Tax Act, 1948 *ss* 2 5 *and* 6—*Agricultural income—Assessment under* s 5 *if to be on the actual realisation or on total rental demand—'Deemed to be the sum realised in* s 5—*Interpretation of—Income from nursery agricultural income*

The word deemed in the expression deemed to be the sum realised in s. 5 is used only in view of the deductions to be made from actual realisations The word deemed is not used in that section to negative the natural meaning of the words

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which clearly indicate that the assessment must take place on the actual realisation made and not on the demands made The word derived used in the definition of agriculture in s 2 also means actually derived and not notionally derived

Whether a nursery would be an agricultural operation will depend on whether it is maintained as an aid or necessary ad junct to the primary process of agriculture carried on by a farm er or it is maintained and run as a business quite independently of agriculture

Maharaj Vibhuti Narain Singh *v* The State of U P 66

U P Civil Service (Judicial Branch) Rules, 1951 *rr* 21 *and* 32—*Constitution of India Arts* 233 237—*Rules of Court* 1952 *Ch III—Appointment of Munsif and the rules for the same, whether void and ineffective*

There is nothing in law or the facts made out in this case to sustain the objection that the U P Civil Service (Judicial Branch) Rules 1951 and as such the appointment of a Munsif there under or his promotion as a Civil Judge were void and in effective, the position regarding diverse objections raised in that behalf being (i) that the initial burden in a writ of *quo warranto* to establish the alleged invalidity or usurpation of office lay on the petitioner (ii) that the High Court for the purposes of Arts 233 to 237 of the Constitution does not mean the whole Court and even if it were so it can not be held that the whole High Court was not consulted (iii) that the impugn ed rules being in respect of matters provided for both by Art 234 and Art. 309 of the Constitution are valid because the power under both the Articles will concur to sustain their validity notwithstanding the non mention therein of Art 234 (iv) that the Public Service Commission was in fact consulted, (v) that Art 234 is not amenable to the construction that the requi site consultation has to be made for making the rules as well as for each individual appointment In so far as the objection in this behalf rests on the provision of r 21 it is saved by r 32(2) (vi) that there was nothing to substantiate the objection that the promotion of the Munsif to the post of Civil Judge was not made by the High Court

Farzand *v* Mohan Singh and others 271

U P Consolidation of Holdings Act, 1953 *ss* 9 49 *and Code of Civil Procedure,* 1908 *s* 9—*Disputes relating to tenure holder's rights in respect of agricultural holding can be decid ed by the Consolidation authorities—Relief claimed for posses sion over proprietary rights in respect of certain Zamindari villages—Who is entitled to compensation and rehabilitation amount—Dispute cannot be decided by the Consolidation authorities—Appeal from such dispute not hit by s* 5

Consolidation authorities are tribunals of limited jurisdic tion They are not courts or civil or revenue courts with the re sult that they cannot adjudicate upon any matter in respect of which there is no express provision permitting them to adjudi cate upon It is well settled that the bar to the jurisdiction of civil courts cannot be readily inferred and that their jurisdiction

can be barred only by an express provision or one from which such a bar can be inferred by necessary implication S 49 of U P Consolidation of Holdings Act bars proceeding in a civil or revenue Court only in respect of such matters which could be adjudicated upon or have been completely adjudicated upon by a consolidation authority The bar does not extend to matters which are beyond the purview or competence of the consolidation authorities to decide

The function of the consolidation authorities are limited to deciding questions relating to tenure holders right only that is rights of *bhumidhars* or *sirdars* or *asamis* in respect of agricultural holdings and beyond this they can decide nothing Consolidation authorities are not competent to decide question of proprietorship

The relief in the present case is for possession over proprietary rights in respect of certain Zamindari villages Admittedly these rights now vest in the State of U P but clearly one of the parties to this litigation is entitled to the compensation and the rehabilitation amounts in respect of these villages As to who is entitled to compensation and rehabilitation amounts cannot be determined by the consolidation authorities and as such this appeal neither can be stayed nor has abated under the provisions of s of the Act

Syed Ashfaq Hussain and others *v* Waqf Alal Nafs and Alal Aulad and Alal Aulad through Smt Zahida Khatoon 212

—— 1954 s 5(c)(ii)—*Subcl (ii) of cl (c) of s does not prohibit sale of the entire holding*

Subcl (ii) of cl (c) of s 5 of the U P Consolidation of Holdings Act 1953 as it stood after the amendment by U P Act VIII of 1963 does not prohibit sale of the entire holding The words used in subcl (ii) are

Any part of his holding'

The entire holding cannot be described as a part of the holding

Ram Bahari Shukla *v* Munna Lal Shukla and others 912

—— 1953 s 12—*Scope—Extent of the powers of appellate authority—Code of Civil Procedure* 1908 *O XLI r 33—Principle deducible from—Principle applicable to appellate authorities under the U P Consolidation of Holdings Act*

S 12 of the U P Consolidation of Holdings Act as it stood prior to its amendment by U P Act VIII of 1963, in effect provides that matters to be raised in proceedings under ss 7 to 10 of the Act can be raised in proceedings under s 12 provided the cause of action for them did not exist when proceeding under ss 7 to 10 were started or were in progress

It is well settled that once the matter is taken in appeal the whole case is reopened and the powers of the appellate authority are identical with that of original authority

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Though the provisions of the Code of Civil Procedure do not as such apply to proceedings under the U P Consolidation of Holdings Act nonetheless the principle deducible from O XLI r 33 C P C can be applied to the appellate jurisdiction under the provisions of the U P Consolidation of Holdings Act.

Smt Raj Kunwari *v* Deputy Director of Consolidation U P Lucknow and others 528

——*Ss 12 and 21 and U P Consolidation of Holdings Rules r 34—Proceedings under s 12 of the Act—Nature of—Can not be regarded as summary or mutation proceedings*

There is no warrant for the proposition that the Legislature considered the proceedings under s 21 of the Act as determinative of the question of title or of questions involving rights to Sirdari Adhivasi and Asami rights hence it provided for an appeal while proceedings under s 12 of the Act were regarded merely as summary proceedings in the nature of mere mutation proceedings under the Land Revenue Act inasmuch as r 34 from the very inception of the Act provided for an appeal from the order of the Consolidation Officer

——*Ss 23 20 and 12—Objections which could be filed under r 12 cannot be filed under s 20*

Any argument based on the effect of s 23 does not establish that s 20 permits filing of objections of similar nature which could be filed under s 12 of the Act

——*Ss 23(2) and 38(2)—Confirmation of statement of proposals under s 23(2)—Correction of clerical error can be done at any time under s 38(2) before notification*

In any case it is always open under sub s (2) of s 38 of the Act to the Consolidation Officer or Settlement Officer (Consolidation) to correct a clerical error apparent on the face of the record in any document prepared under any provision of the Act This can be done even though the statement of proposals achieves confirmation under s 23(2) of the Act The power under sub s (2) of s 38 can be exercised at any time before the notification under s 52 is issued

Sita and others *v* The State of U P and others 771

——*s 23—Constitution of India—Confirmation of statement of proposals—Whether precludes exercise of writ jurisdiction*

The confirmation of the statement of proposal under s 23 of the Consolidation of Holdings Act does not deprive the High Court of its powers under Art 226 of the Constitution the actual exercise of that power however remaining a different matter dependant on the fact and circumstances of each case

Chobey Sunder Lal *v* Sonu *alias* Sonpal and another (F B) 688

U P Kshetra Samitis (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules, 1962

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s 57(1) 10 and 13—*Defence open to returned candidate—Can prove that certain votes should have been counted in his favour*

According to s 57(a) read with r 10, the returned candidate can take any defence to show that he has been validly elected He can allege and prove that certain votes should have been counted in his favour R 43 also places no limitation on the jurisdiction of the Judge

——*Sch II, Instruction 1(5)— Exhausted paper —When ballot paper is not an Exhausted paper*

Where a third preference was recorded on a ballot paper in favour of a continuing candidate while the second preference was for a candidate who had been eliminated at one stage *held*, that such a ballot paper will not be an exhausted paper

Dhan Singh *v* The District Judge Meerut 839

U P Municipalities Act, 1916 s 47 *A* (1)(*a*)—*Resignation within computation of the period—Resignation, when takes effect—Expressions of or from if make a difference*

Where a statute requires an act to be done within a specified period of a certain date, the period commences from the date immediately next after the date The use of expressions from and of in the context bring about no real difference Under s 47 A(1)(*a*) the President is entitled to a clear period of three days immediately following the day on which he received the communication of the passing of the motion of no-confidence

Shamshuddin *v* Dr B N Screen and others 557

——, *sub ss* (3) *and* (5) *of s* 87 *A—No confidence motion against President of the Municipal Board—Period of 7 clear days of notice and not earlier than 30 days for convening meeting—How to be computed—Power of Presiding Officer to adjourn meeting fixed—Whether exercisable before or without actual meeting*

The period of 7 clear days of notice of the meeting for considering no-confidence motion is, as provided expressly by s 87 A(3) of the Municipalities Act itself to be computed from the date of the dispatch and not receipt of the registered notice

It is no doubt true that in the expression not less than thirty days' both the terminal days have to be excluded but the force of the expression not earlier than thirty days is not the same and it (the latter expression) means that it should not be the 29th day but there is nothing to show that the expression excludes the 30th day from the computation Accordingly, where notice of no confidence motion was delivered to the District Magistrate on 26th October and the date fixed for the meeting was 25th November, the interval cannot be said to be earlier than 30 days so as to amount to a breach of the provision in that behalf made by s 87 A(3) of the Municipalities Act

The power of adjournment vested in the Presiding Officer under s 87 A(5) of the Municipalities Act may be exercised in advance and before or without the actual meeting

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Jai Charan Lal Anal v The State of U P and others 670

——— s 128(1) (xii)—*Rules under, octroi and tax by Municipal Board of Saharanpur Sch B Item 2—Indian Tramways Act (XI of) 1886 subss (a) and (b) of s —Indian Railways Act (IX of 1890) subss (1) and (3) of s —Shahdara (Delhi) Saharanpur Light Railway Co Ltd whether exempt from terminal tax imposed by Municipal Board Saharanpur*

The Shahdara (Delhi) Saharanpur Light Railway Co Ltd which had been registered under the Tramways Act and to which the Railways Act (except s 135 thereof) had been extended to apply is a railway within the meaning and for the purposes of exemption from payment of terminal tax under item 2 of Sch B of the Rules framed by the Municipal Board of Saharanpur under the Municipalities Act

The Shahdara (Delhi) Saharanpur Light Railway Co Ltd v The Municipal Board Saharanpur and another 681

U P Muslim Waqfs Act, 1960 s 71 s 72(1)—*and Code of Civil Procedure 1908 O XXXIX—Stay—Jurisdiction of Tribunal to grant stay*

Constitution of India (1950) Art 226—*Interference under— If the Tribunal has not acted in excess of its jurisdiction*

S 71 provides that the mere pendency of a dispute question or matter before a Tribunal will not have the effect of staying or suspending any proceedings before the Board It follows that if the Tribunal finds some good cause for suspending proceedings before the Board it can do so under the provisions of O XXXIX of the Code of Civil Procedure The jurisdiction of the Tribunal to grant the stay under the Code of Civil Procedure is not barred though the Tribunal will not exercise that jurisdiction and grant the stay only on the ground that a dispute has arisen before it in the matter

If a Tribunal has jurisdiction it has jurisdiction to pass an order rightly or wrongly and the High Court will not interfere under Art 226 of the Constitution if the Tribunal has not acted in excess of its jurisdiction

The U P Shia Central Board of Waqf Lucknow v Nawab Sultan Ali Khan and another 928

U P Nagar Mahapalika Adhinyam, 1959 ss 106 107 108 587(3) 577(f)—*Officiating or temporary appointments on the posts created under s 106—S 108 apply—Ss 107 577(B) and r 15 of the U P Nagar Mahapalika Sewa Niyamawali 1962 do not apply to such appointment—Procedure under s 107 has to be followed in case of permanent appointments*

Alternative remedy—*Right to get an order reviewed by the same authority—Relief under s 587(3) of U P Nagar Mahapalika Adhinyam, 1959—It alternative remedy*

S 108 of the U P Nagar Mahapalika Adhinyam 1959 is independant of s 107 While s 107 relates to the permanent appointments to the posts s 108 relates to officiating and tem

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porary appointments. Cl. (j) of s. 277 does not deal with such appointments. S. 277(j) of the Adhiniyam should be read along with ss. 106, 107 and 108 of the Adhiniyam and taking them as a whole it would appear that in case of servants of the Municipal Board improvement Trust Development Board or the local authority the procedure under s. 107 has to be followed only in cases where they have to be appointed permanently to the new posts created under s. 106 and not temporarily to which s. 108 applies.

Held as the petitioner was appointed temporarily on the post of Sahayak Nagar Adhikari s. 108 of the Adhiniyam applied to him and not s. 107. S. 277(j) of s. 15 of the U. P. Nagar Mahapalika Sewa Niyamawali 1962.

The relief under s. 277(j) of the Adhiniyam is only a discretionary relief given to the Mahapalika or any other person who may like to make any representation to get the order reviewed by the State Government. A right to get an order reviewed by the same authority is not an absolute right but is a very limited right and it cannot be said that it is a remedy alternative to one provided under Art. 226 of the Constitution.

Hari Shanker Sharma v. The State of U. P. 579

U. P. Panchayat Raj Act, 1947 *ss. 2(ss) 9(1)(g) and 96 (1)—Delegation of its powers by State Government under s. 95(1)(g) to Sub Divisional Officer—Additional Sub Divisional Officer not included by virtue of s. 2(ss)—Order under s. 95(1)(g) by Additional Sub Divisional Officer is nullity—Order does not attain any higher status even when confirmed in appeal*

Notification no. 1181/P.XXVIII—60-57 dated 19th December 1958

By notification no. 1181/P./XXVIII—60-57 dated 19th December 1958 the State Government in exercise of its powers under s. 96 (1) delegated its power to take action under cl. (g) of sub s. (1) of s. 95 of the Act to the Sub Divisional Officer subject to appeal before the District Magistrate.

Held Additional Sub Divisional Officer is not included by virtue of s. 2(ss) of the Act and order passed by him under s. 95(1)(g) is nullity.

An order passed without jurisdiction is a mere nullity and it does not attain any higher status simply because an appeal is preferred from it and it is confirmed in appeal. It may be that the appellate Court in disposing of an appeal has the same powers which the trial Court possesses in respect of a matter. It may also be that the pendency of an appeal is tantamount to the pendency of original proceedings in an appellate Court.

District Magistrate, Unnao and others v. Paras Nath Shukla 124

U. P. Sales Tax Act 1948 *s. 2(h)—Valuable consideration—Meaning of—Whether ultra vires—If it covers bullion given for ready made ornaments—Nature of the transaction*

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The words valuable consideration which do not find place in the definition of sale in the Sales of Goods Act must be held to be *ultra vires* the scope of the State Legislature These words, at least, can be interpreted on the basis of the rule of *ejusdem generis* to mean payment by cheque bills of exchange or any such other negotiable instruments Thus where bullion is given in exchange for ready made ornaments the transaction would not be sale but an exchange or barter

Sales Tax Commissioner U P *v* Ram Kumar Agarwal 23

U P Sales Tax Act, (*XV of*) 1948, *s 3 A—Notification no 905/X—Whether safety razor falls within the purview of item no 6 of the said notification viz Cosmetics and Toilet requisites*

Safety razor does not fall within the purview of the expression Cosmetics and Toilet requisites used in item no 6 of the notification made under s 3 A of the U P Sales Tax Act and is not taxable as such at the higher rate

Plastic Products Ltd Kamla Towel Kanpur *v* The Commissioner Sales Tax, U P 160

——, *ss* 11(1) 21 *and* 7—*Rule* 41(3)—*Appellate Court remanding case to Sales Tax Officer—His power to include a turnover under s* 21

Where in an appeal the assessment is set aside and the case is remanded with direction for re assessment the Sales Tax Officer acquires all the powers available to him under s 7 and r 4(b) in relation to original assessment In such circumstance the assessment continued pending S 21 will apply only if the assessment has already been completed and became final Therefore in the absence of such finality the Sales Tax Officer cannot take action under s 21

D S But and Sons *v* The Commissioner of Sales Tax 56

U P (Temporary) Control of Rent and Eviction Act, *III of* 1947 *ss* 2(*d*) *and* 3—*Permission granted by an authority other than District Magistrate—No evidence that he was authorised by District Magistrate—Presumption of such authorisation—It can be made—Indian Evidence Act*, 1872, *s* 114(*e*) Notice—*Service by post—Notice under s* 106 *Transfer of Property Act sent by post—Presumption of service—Endorsement of refusal by postman—Proof of correctness of—Plea of—Waiver—When not to be allowed—Transfer of Property Act* 1882, *ss* 106 *and* 113—*General Clauses Act*, 1897 *s* 27

There is a presumption that judicial or official acts have been regularly performed under s 114(*e*) Evidence Act Where the authority granting the permission was not disputed in the pleadings nor in the earlier proceeding for granting of permission *held* that the presumption may be drawn that there was authorisation as contemplated under s 2(*d*) of the Act.

Though the initial burden of proving it lies on the plaintiff but he having produced an order it shifted to the defendant to rebut the same

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Wherever a communication is sent by post there is presumption of its due delivery and where returned with the endorsement refused there will be a presumption of tender by postal authority notwithstanding that the postman was not produced

Where a plea of waiver was neither taken nor was an issue framed it was disallowed in appeal

Munshi Lal and others v Nasi 49

——, 1947, s 3—*Code of Civil Procedure (Act V of)* 1908 s 151 *and O* 41, r 5—*Permission for ejectment of tenant given after the passing but before the knowledge of stay order—Whether valid*

An order of stay in an execution matter is in the nature of a prohibitory order addressed to the execution court and as such takes effect from the time it comes to the knowledge of that court It does not till then affect or deprive the court of its jurisdiction to proceed with the execution It is however open to the court to take such action in the manner as may be required in the interest of justice in its inherent jurisdiction under s 151 of the Code after the stay order comes to its knowledge

What is true of execution proceedings applies with greater force where the stay order has been passed in the proceedings for transfer of the case Accordingly where the permission for ejectment of the tenant was granted under s 3 of the U P Control of Rent and Eviction Act after the passing but before the knowledge of the stay order by the District Magistrate the permission is not a nullity and the suit based on the same is good and effective

[The petition may be different and not governed by the above rule (as to which no opinion was expressed in this case) where the stay order is made for ministerial officers e g requiring a bailiff not to sell]

Mulraj v Murli Raghunathji Maharaj 412

U P Tenancy Act, 1939 *ss* 29 *and* 80—*Usar land given by Zamindar to appellant through unregistered deed dated 17th December,* 1929—*Appellant found in possession since 17th December* 1929—S 80 *does not apply—Appellant acquired hereditary rights under* s 29

Where the Zamindar gave Usar land by unregistered deed Ex A 3 dated 17th December 1929 to the appellants with liberty to use it as pasture land or to plant trees on it or bring it under cultivation on condition that in case they brought it under cultivation they would be liable to pay rent according to the quality of the land the appellants being found in possession of the land ever since December 1929

Held s 29 of the U P Tenancy Act applied to confer hereditary rights on the appellants the moment it is found that s 80 had no application

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Sital Din and others v Deoki Nandan and others 670

The U P Town Areas Act, 1914 *s 3—Declaration under s 3(1)—Nature of—Opportunity to residents of the locality to oppose not necessary—Such declaration is conclusive proof that particular area is not an agricultural village*

A declaration by the State Government under sub-s (1) of s 3 of the U P Town Areas Act 1914 declaring particular area to be a Town Area is conclusive proof according to sub-s (2) of s 3 of its decision that particular area is not an agricultural village Such a declaration is of administrative nature Since the decision is of administrative nature it is not necessary for the State Government to give an opportunity to residents of the locality to oppose such a proposal S 3 of the Act is valid

The Tulsipur Sugar Company Ltd v The Notified Area Committee Tulsipur 917

U P Zamindari Abolition and Land Reforms Act, 1950 (*U P I of 1951*) *s 20(b)—Entry as sub-tenant—Whether amounts to that of recorded occupant and confers Adhivasi rights—Entry of sub-tenancy over a portion of land—Whether Adhivasi right limited to that portion—Proof of sub-tenancy over whole plot—Whether permissible*

A person whose name is recorded in the column of sub-tenants in the *Jhasra* or *khatauni* of 1356 F without there being any one else recorded as *gair* or *dawedar gair* in the remarks column would be a recorded occupant and entitled as such to Adhivasi rights under s 20(*b*) of the Zamindari Abolition and Land Reforms Act

The decision of the Full Bench in the case of *Ram Dulare Singh v Babu Subhu Ram* is not a good law in view of the Supreme Court decisions in the case of *The Upper Ganges Sugar Mills Ltd v Khalilul Rahman* and *Amba Prasad v Habboob Ali Shah*

Where a person is recorded as sub-tenant of a portion of the plot he would become Adhivasi only that portion of the plot and it is not open to him for the purposes of s 20(*b*) of the Act to prove that he was sub-tenant of the whole plot

Chobey Sunder Lal v Sonu *alias* Sonpal and another (F B) 688

——*ss 21(1)(b), 157(1) and 202 (as amended)—'Landholder' Who is—Whether the person who instituted the suit under s 202 or a person who was landholder on material dates—If should be disabled person as contemplated under sub-s (1) of s 157 on the date of vesting—Applicability of the provision*

For the purposes of s 21(1)(*b*) of the Act the landholder is the person who was the landholder on the date of vesting

This provision applies to a tenant or a sub-tenant or an occupant as the case may be where the landholder belonged to one or more classes mentioned in sub-s (1) of s 157 of the Act both on the date of letting or occupation and on the 9th

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April 1946 The question of the disability of the landholder who files the suit does not require any consideration Even if the disability may have ceased he continued to be landholder on the date of vesting

Hasan Bibi and others v Ram Din and another 17

——— s 28(1)(b)—*Effect of the deletion by* s 6 *of U P Land Reforms (Amendment) Act* XX *of* 1954 *and by* s 3 *of Act* XVIII *of* 1956—*Transferee becomes* bhumidhar—*Enforcement of his rights to compensation and rehabilitation grants from* 1*st July* 1952

The import of cl *(b)* of s 28(1) of the Act on the transfer made after 7th July 1949 is that though the transferee by reason of such transfer becomes the intermediary and a *bhumidhar* under s 18 it bars recognition of his rights as such *bhumidhar* for any of the purposes of the Act whatsoever Instead as a result of the deeming provision in the clause the transferee continues to have those rights notwithstanding the transfer

As a result of the deletion of cl *(b)* from 10th October 1954 the bar against recognition is removed and the transferee can enforce his rights as from that date The deletion of cl *(b)* by Act XX of 1954 was however prospective There fore for the period between 1st July 1952 and 10th October 1954 the rights of the transferee under the Act such as the right of compensation and rehabilitation grant would still not be recognised To remove this difficulty the Legislature by s 3 of the Amendment Act 1956 made the deletion of cl *(b)* re trospective from the date of the commencement of the Act with regard to the right of the transferee to compensation and re habilitation grant

Smt Kalwanti v Bisheshwar 827

U P Zamindari's Debt Reduction Act *(XV) of* 1938 *ss* 3 *and* 4 *Charge by a decree in a suit on promissory note—Whether a secured debt liable to reduction*

A debt secured by a charge will be a secured debt for the purposes of the Zamindari's Debt Reduction Act provided the charge was there since before the date of the suit Accordingly where the decree in a suit on promissory note created a charge on certain villages belonging to the judgment debtor it could not in execution proceedings be considered to be a secured debt liable to reduction within the meaning and for the purposes of ss 3 and 4 of the Act

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CRIMINAL REVISION

Before Mr Justice Inkan and Mr Justice Dwivedi

LAL SINGH AND OTHERS — APPLICANTS

1966

July 28

STATE — OPPOSITE PARTY

General Rules (Criminal), 1957 r 6—*An advocate—If can act on a mere memorandum of appearance in a criminal case*

Under r 6 of the General Rules (Criminal) 1957 an advocate may act on behalf of a party in a district criminal court merely on his filing a memorandum of appearance It is not necessary for him to file a *vakalatnama* A pleader or a Mukhtar however is required to file a *vakalatnama*

Criminal Revision No 1934 of 1963 against the judgment and order of Kailash Nath Endley IInd Temp Civil and Sessions Judge Etah in Criminal Revision No 27 of 1963, decided on 19th November 1963

Keshav Sahai for the Applicant

Deputy Government Advocate, Gopi Nath Kunzru and *J Swarup*, for the Opposite Party

The following judgment of the Court was delivered by—

DWIVEDI, J —This case comes to us on reference by a learned single Judge

One Durbin Singh was an accused in a criminal case He absconded Steps were taken against him under ss 87 and 88 of the Code of Criminal Procedure Some cattle and other things were attached The applicants Lal Singh and others, preferred a claim under sub s

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(6 A) of s 88 to the attachment of two bullocks, two she buffaloes and two calves The claim was made in writing The claim was signed not by the applicants but by their counsel Sri Ram Sanehi Misra Sri Ram Sanehi Misra is an advocate He filed a memorandum of appearance, and not a *vakalatnama* The memorandum of appearance showed that he was appearing on behalf of Lal Singh The other applicants are his brothers The claim was entertained by the Magistrate The oral evidence of the parties was recorded The claim was, however not decided on merits The Magistrate dismissed it summarily on a technical ground that without a *vakalatnama* Sri Ram Sanehi Misra could not act and file the claim on behalf of the applicants His order was maintained in revision by the Sessions Judge Etah

The reason given by the Magistrate does not appeal to our sense of justice It can hardly justify the summary dismissal of the claim on the conclusion of the enquiry We are surprised that the learned Sessions Judge has upheld the Magistrate's reasoning The claim was preferred on 6th November, 1962 It is not clear from the order sheet maintained by the Magistrate that Lal Singh was present when Sri Ram Sanehi Misra filed the claim in the court of the Magistrate However, on 16th November, 1962 Lal Singh and his counsel were present in Court An application for release of the bullocks and she buffaloes from the cattle pound during the pendency of the claim was made on that day It was supported by an affidavit of Lal Singh Lal Singh produced oral evidence to establish his claim on subsequent dates His appearance in court on 16th November, 1962, and his conduct on subsequent dates unmistakably demonstrated that the claim was preferred on his instructions If the filing of a *vakalatnama*

was necessary, there was only an irregularity in the presentation of the claim The claim could not be dismissed summarily for this irregularity after the close of evidence In *Kanhaiya Lal* v *The Panchayati Akhara* (1) a counsel had filed an application for execution of a decree without filing his *vakalatnama* The application was entertained and the execution court acted on it In a subsequent execution application the judgment debtor contended that it was barred by time The decree holder tried to save time by relying on the earlier application The judgment debtor retorted that it was not "in accordance with law and could not therefore save time This Court held that the earlier application could not be considered to have not been made "in accordance with law' merely because it was handed over to the court by a pleader who did not hold the *vakalatnama* from the decree holder MALIK C J said

> I am therefore of the opinion that the physical act of filing or presentation is a part of acting and in my view if a duly authorised agent or a duly appointed pleader does not present the document it is open to the court or the officer concerned to refuse to take it If, however he has taken it and the court has acted on it, I can see no such defect in the presentation of the document as to take away its legal character merely because the actual physical act of handing over the particular document has been done by others when the court is satisfied that the application was as a matter of fact intended to be filed by the decree holder and it was he who had it presented before the officer appointed for receiving such application, through the hands of another To hold otherwise will, to my mind,

(1) A I R 1940 All 367

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result in giving an undue importance to a comparatively unimportant matter

This line of reasoning is sufficient in the particular circumstances of this case to decide this revision in favour of the applicants We shall, however, not rest our decision on this narrow ground and will proceed to deal with the important question of the interpretation of r 6 of the General Rules (Criminal) 1957

The appearance of a counsel on behalf of the parties in a criminal case in the district criminal courts is regulated by the rules made by this Court The rules are known as the General Rules (Criminal) 1957 R 6 is material It reads

> The legal practitioners authorised to practise in criminal courts in the State are the advocates vakils pleaders and Mukhtars hereinafter mentioned
>
> Any advocate entitled to practise in the High Court and not under suspension shall be entitled to practise as such in any court on his satisfying the presiding officer of such court by means of his certificate of enrolment in the High Court or otherwise of the fact of such enrolment and shall be entitled to appear in a particular case on filing a memorandum of appearance
>
> A pleader or Mukhtar shall be entitled to practise if he has been enrolled as such in accordance with the rules in force at the time of his enrolment He shall be entitled to practise only in such court as is mentioned in his certificate of enrolment He shall be entitled to appear in a case after he has filed his *vakalatnama* in the case of a pleader or his *mukhtarnama* in the case of a mukhtar"

A legal rule is not an upstart like a mushroom It is like a living tree It has got its branches and leaves, it has its roots too You have to read it from the roots to the top to understand it The roots give force and colour to the top So you should look for the roots of rule 6 to discover its true meaning

In England a Barrister may appear on behalf of a party in a court of law He may enter into a compromise examine and cross examine witnesses and sign a petition of appeal to the House of Lords When he appears in a court and states that he is instructed the court will not enquire into his authority to appear (Halsbury Laws of England 3rd Edition page 49) Until 1926 legal practitioners included advocates vakils and pleaders The advocates preponderantly consisted of the Barristers practising in the Allahabad High Court and the courts subordinate to it They were all covered in the definition of the word 'pleader' in the Code of Criminal Procedure and the Code of Civil Procedure S 30 of the Code of Civil Procedure 1882 expressly provided that no advocate of any High Court established by Royal Charter shall be required to present any document empowering him to act S 30 later became r 4 of O III of the Code of Civil Procedure 1908 Sub r (3) of r 4 provided that no advocate of any High Court, who is a Barrister shall be required to present any document empowering him to act Other legal practitioners were required to file a *vakalatnama* So an advocate who was a Barrister could act in a civil court without filing a *vakalatnama* until 1926 In 1926 the Bar Councils Act was passed It created two classes of legal practitioners advocates and pleaders Any law graduate could become an advocate by taking one year's training and depositing the prescribed fee After this Act the Civil Procedure Code (Second Amend

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ment) Act (No XXII of 1926) was passed It radically amended r 4 of O III The amended rule puts on an equal footing all the legal practitioners All of them including the advocates are now required to file a *vakalatnama* for the purpose of acting on behalf of a party But they may plead on behalf of a party merely by filing a memorandum of appearance

On the criminal side the advocates were never required to file a *vakalatnama* for the purpose of acting on behalf of a party We could not lay our hands on a copy of the General Rules (Criminal) in force before 1911 in the area under the territorial jurisdiction of the Allahabad High Court R 1 of Chap II of the General Rules (Criminal) 1911 dealt with the legal practitioners appearance in criminal courts as follows

> The pleaders authorised to practise in Criminal courts in the North Western Provinces are the advocates, attorneys vakils, pleaders and Mukhtars hereinafter mentioned
>
> Any advocate, attorney or vakil on the roll of the High Court and not under suspension, who in the case of an attorney or vakil, has filed his *vakalatnama*, is entitled to practise as such in any court upon producing to the presiding officer of such Court his certificate of enrolment in the High Court, or otherwise satisfying such presiding officer of the fact of such enrolment A pleader is entitled to practise only after enrolment as required by r 27 of the Rules of the 10th August 1904, and only in such a Court as is mentioned in his certificate granted under r 25 of the said rules
>
> A Mukhtar may be appointed to act in any criminal proceeding with the permission of the court

in which he is authorised to practise under r 27 of the rules of the 10th August, 1904

In December 1923, the last paragraph was deleted and after the words 'a pleader' in the second paragraph the words "or Mukhtar" were added After this amendment, a Mukhtar could also practise in a criminal court as of right and without obtaining the permission of the court

It may be observed that under r 1 it was not necessary for an advocate if he wanted to act on behalf of a party in a criminal case to file a *vakalatnama* He was not even required to file a memorandum of appearance The law regulating the appearance of an advocate in district criminal courts was the same as the law regulating the appearance of a Barrister in the criminal courts in England

By a later amendment the words 'North Western Provinces' in r 1 were replaced by the words 'Province of Agra'

The legal rule embodied in r 1 continued in force for a long time Sometime after 1934 (the definite date could not be ascertained), rule 1 was amended The relevant part of the amended rule read

> Any advocate on the roll of Advocates of the High Court and not under suspension is entitled to practise as such in any court upon producing to the presiding officer of such court instructions from his client authorising him to appear and plead on such client's behalf and upon producing to the presiding officer of such court his certificate of enrolment in the High Court or otherwise satisfying such presiding officer of the fact of such enrolment"

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This amendment made a significant change It required an advocate to produce before a district criminal court instructions from his client authorising him to appear and plead on his behalf This amendment operated until the beginning of 1943 Thereafter, in this amendment the words upon producing to the Presiding Officer of such court instructions from his client authorising him to appear and plead on such client's behalf were substituted by the words 'on filing in the court a memorandum of appearance In the result an advocate could act after the beginning of 1943 on behalf of a party in a district criminal court on his filing in the court a memorandum of appearance for the word practice means acting as well as pleading [*Haran Kumar Ghosh* v *Arbinda Bose*, (1)]

The law in Oudh was the same When the Oudh Chief Court and the former Allahabad High Court were amalgamated into a new High Court called the High Court of Judicature at Allahabad, there was no change

To sum up the privilege of Barristers in England to appear in a criminal court without filing a *vakalatnama* was enjoyed until 1926 by the advocates practising in the civil and criminal courts subordinate to the Allahabad High Court and the Oudh Chief Court From 1926 the privilege was withdrawn on the civil side But it continued on the criminal side The privilege appears to us to be a sheer accident of history

The General Rules (Criminal) 1911, and the Oudh Criminal Rules 1928 were replaced by the General Rules (Criminal), 1957 The new General Rules were made to prescribe a common code for the entire State We have already quoted r 6 of the new rules R 6 now regulates the practice of the advocates in the district criminal courts of the State Till the commencement of

(1) 1952 S C R 869

these rules, an advocate was not required to file a *vakalatnama* for the purpose of acting on behalf of his client in a district criminal court. We put it to ourselves what is there in rule 6 to show that after 1957 an advocate could not act on behalf of his client in a district criminal court without filing a *vakalatnama*? The General Rules (Criminal) 1957 were professedly issued to consolidate the law for the whole State by superseding the General Rules (Criminal) 1941 and the Oudh Criminal Rules 1928. The professed purpose would not show that the High Court intended to make a radical departure from the previous law. In our opinion the language of rule 6 also does not evince such intention. We have already pointed out that the word 'practise' in paras 2 and 3 of r. 6 shall mean both acting and pleading. So an advocate, pleader or Mukhtar is entitled to act as well as plead in a district criminal court. But two conditions should be fulfilled before any of them could act and/or plead. Firstly, an advocate should show to the court his certificate of enrolment in the High Court or otherwise satisfy the court of such enrolment. A pleader or Mukhtar may practise only in such court as is mentioned in his certificate of enrolment. Secondly, an advocate shall be entitled "to appear' in a case on filing a memorandum of appearance. A pleader or Mukhtar shall be entitled "to appear' in a case on his filing a *vakalatnama* or a *Mukhtarnama*, as the case may be. What does "appear" imply in the second or third paragraph of the rule? A legal practitioner does not appear for himself in a case. Some person is required to appear before a criminal court. He may be required to appear for prosecuting or defending in a case or for any other purpose. He may instruct a legal practitioner to appear on his behalf for prosecuting or defending in a case or for any other purpose. When a legal practition

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er so appears he is said to practise in a court In other words he is said to act and/or plead as the case may be Accordingly we think that the words to appear in paras 2 and 3 mean to appear for acting and/or pleading on behalf of a party in a case An advocate may appear to act and/or plead on behalf of a party in a case on his filing a memorandum of appearance while a pleader or Mukhtar may so appear on his filing a *vakalatnama* or *mukhtarnama*, as the case may be

If r 6 is construed in the light of its history, purpose and language there is no difficulty in holding that an advocate may act on behalf of a party in a district criminal court merely on his filing a memorandum of appearance It is not necessary for him to file a *vakalatnama* A pleader or Mukhtar is however required to file a *vakalatnama* for acting as well as pleading Accordingly the claim of Lal Singh and another was validly preferred by Sri Ram Sanehi Misra as he had filed a memorandum of appearance The lower courts have wrongly held that it was necessary for him to file a *vakalatnama* for preferring the claim

Before concluding we should mention that Sri *Gopi Nath Kunzru* and Sri *Jagadish Swarup* have at the request of the Court appeared on behalf of the U P State Bar Council and the High Court Bar Association and have given us valuable assistance We are thankful to them We should also say that the language of r 6 now needs some amendment in the light of the Advocates Act

We allow the revision and set aside the orders of the learned Sessions Judge and the Magistrate The case will now go back to the Magistrate through the Sessions Judge Etah for decision of the claim of the applicants on merits

Revision allowed

CRIMINAL REVISION

Before Mr Justice Umraj

RAM NATH — APPLICANT

v

SALIG RAM SHARMA — OPPOSITE PARTY

1966

July 29

Code of Criminal Procedure, 1898 s 197—*Complaint against public officer—Sanction—Necessity of—Act constituting the offence when within the ambit of official duty—Question of the necessity of sanction—If to be decided before cognisance is taken—Complaint alleging assault on a witness by police officer to obtain statement—Sanction, if necessary*

In order that an act of a public servant may fall within the ambit of his official duty it must be shown that it was committed in the discharge of his official duty There must be a reasonable connection between the act and the official duty It does not matter if the act exceeds what is strictly necessary for the discharge of the duty as this question would arise at a later stage when the trial proceeds on the merits

It is no part of the duty of a police officer to assault a witness or an accused in order to obtain a statement from him It is equally not so to put a person under unlawful restraint to extort a confession as none of them can be said to have any connection with the official duty of a police officer and consequently sanction in such a case is not necessary

The question of the necessity of a sanction may arise in the course of the trial Therefore, the absence of sanction does not debar the cognisance of a complaint

Matajog Dobey v *H C Bhari* (1) and *Nagwant Sahay* v *D W Ife* (2) followed

Somchand Sanghvi v *Bibhuti Bhushan* (3) distinct

Criminal Revision No 1997 of 1964 connected with Criminal Revision No 1998 of 1964 against the Judgment and Order of P K BANERJI, Sessions Judge, Jaunpur, decided on 26th August, 1964

T Rathore, for the Applicant

(1) A I R 1956 S C 44 (2) A I R 1946 Pat 452
(3) A I R 1965 S C 698

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RAM NATH v. SALIG RAM SHARMA

UNIYAL, J —These two connected revisions are directed against the judgment of the Sessions Judge, Jaunpur, upholding an order of the Magistrate dismissing the complaint filed by the applicants on the ground that sanction to prosecute the accused under s 197 Cr P C had not been obtained

There was an incident on the 19th October, 1963 in the Town of Jaunpur in the course of which some students and members of the staff of a local college raided the railway station looted it and damaged its property In that connection several students teachers and other persons were arrested on 20th October, 1963 and taken to police station for interrogation It was alleged that the applicants were arrested on the 20th October, 1963 and were kept under detention at the police station till 8 p m During this period the Station Officer asked them to make a statement against the Principal of the College which they refused to do Then at 2 p m on 21st October 1963 the Deputy Superintendent of Police arrived there and enquired whether the applicants had made a statement When he was informed that they were unwilling to do so the Deputy Superintendent of Police assaulted them with fists and kicks, as well as with a *gupti* (sharp edged weapon) The applicants were threatened and told that if they did not agree to make a statement they would be dealt with severely On account of fear induced by the said threats and assault committed on them they were coerced to make a statement before a Magistrate first class of Jaunpur who recorded their statements under s 164 at 5 p m on 21st October, 1963

On these allegations two complaints were filed one by Ram Nath and the other by Jagai Ram, against the Opposite party Sri Salig Ram Sharma Deputy Superintendent of Police, Jaunpur under ss 328, 330 342 194, 195 and 196, I P C The Magistrate entertained the

complaint and recorded the statement of the complainant and his witnesses. At this stage an application was moved on behalf of the opposite party contending that the complaints were barred under s. 197 on the ground that the sanction of the State Government had not been obtained against the opposite party in respect of acts done or purporting to be done by him in the discharge of his official duty. These objections was upheld by the Magistrate who dismissed the complaint on the short ground that the opposite party was a public servant and the offence alleged to have been committed by him being in fact done or purported to have been done in discharge of official duty the complaint lodged against him without the sanction of the State Government was liable to be dismissed.

In dismissing the complaints the Magistrate placed reliance on *Matajog Dobey v. H. C. Bhari* (1). In that case the Supreme Court was considering the meaning of the words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty occurring in s. 197, Cr. P. C. It was observed that in order that an act of a public servant may fall within the ambit of his official duty it must be shown that it was committed in the discharge of his official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits.

On the facts alleged in the complaints under consideration the acts attributed to the opposite party could not have any relation to his official duty as a police officer. It is no part of the duty of a police officer to assault a witness or an accused in order to obtain a statement

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v
SAHU
RAM SHARMA

Uniyal J

from him It is equally no part of a police officer s duty to put a person under unlawful restraint in order to extort a confession from him None of these acts could be said to have any connection with the official duty of the opposite party

In *Nagwant Sahay* v *D W Ife* (1) certain students who were suspected to have taken part in fracas were taken to the bungalow of the Deputy Commissioner and were alleged to have been caned there by the Deputy Superintendent of Police after consultation with the Deputy Commissioner Complaints were lodged against these officers under s 323, I P C before a Magistrate who dismissed them on the ground that sanction for the prosecution of the accused had not been obtained under s 197 It was held that it is no part of the duty of a Deputy Commissioner or of an officer of the police force to chastise persons who have committed, or are alleged to have committed offences even though it may be admitted by the persons accused of committing the offence that they had in fact committed it Their duty is to apprehend the offenders and to produce them before a court and it is the duty of the Court alone to decide whether the alleged offence has been committed and what punishment should be inflicted on the offenders The High Court of Patna was of the opinion that on the allegations made in the complaint the Magistrate was not justified in dismissing the complaint on the ground of want of sanction I am in respectful agreement with the above observations

The State Counsel referred to *Somchand Sanghvi* v *Bibhuti Bhushan* (2) and contended that it was within the scope of the official duty of the opposite party to interrogate the applicants at the police station and that if he believed that they were involved in a cognizable offence, to keep them in police custody These various

(1) A I R 1946 Pat 459 (2) A I R 1965 H C 688

acts, according to him fell within the scope of the duty of the opposite party and therefore he could not be prosecuted without sanction of the State Government under s 197. The facts relating to the case of *Somchand Sanghvi* (1) were clearly such as would bring the acts alleged within the scope of the official duty of the police officer. In the instant case the allegation against the opposite party was not that he had no authority to take the applicants to the police station or to interrogate them. On the other hand it was alleged that they were taken to the police station with the object of being forced to make a statement under s 161 Cr P C and were assaulted and coerced into making such a statement. The case of *Somchand Sanghvi* (1) is in my opinion, clearly distinguishable and has no application to the facts of the present case.

It was next contended on behalf of the State that sanction to prosecute a public servant is required to be obtained before the court takes cognizance of the offence and, therefore, the Magistrate had no jurisdiction to entertain the complaint against the opposite party without a formal sanction of the State Government under s 197 Cr P C. This contention appears to me to be unfounded. In the case of *Matajog Dobey* (2) the Supreme Court made it clear that whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case. Their Lordships pointed out that the complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of Public duty but facts that may come to light subsequently in the course of the prosecution evidence at the trial, or otherwise may establish the necessity for sanction. In that event the court shall dismiss the complaint on the ground that the accused could not be pro-

(1) A I R 1965 S C 888 (2) A I R 1956 S C 44

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RAM SHARMA

Uniyal J

secuted without sanction of the State Government under s 197

I am therefore, of the opinion that the courts below were in error in holding that the complaints were liable to be thrown out on the short ground that sanction to prosecute the opposite party had not been obtained by the applicants

I accordingly allow these revisions, set aside the orders of the Magistrate dismissing the above complaints and direct that the Magistrate shall proceed with the case according to law

Revisions allowed

APPELLATE CIVIL

Before Mr Justice B Dayal and Mr Justice Seth

HASINA BIBI AND OTHERS — APPELLANTS

v

RAM DIN AND ANOTHER — RESPONDENTS

1966

August, 19

**U P Zamindari Abolition and Land Reforms Act, 1951, ss 21(1)(*h*) 157(1) and 202 (*as amended*)—'*Landholder*'—*Who is—Whether the person who instituted the suit under s 202 or a person who was land holder on material dates—If should be disabled person as contemplated under sub s (1) of s 157 on the date of vesting—Applicability of the provision*

For the purposes of s 21(1)(*h*) of the Act the 'landholder' is the person who was the land holder on the date of vesting

This provision applies to a tenant or a sub-tenant or an occupant as the case may be where the landholder belonged to one or more classes mentioned in sub s (1) of s 157 of the Act, both on the date of letting or occupation and on the 9th April, 1946 The question of the disability of the land holder who files the suit does not require any consideration Even if the disability may have ceased, he continued to be land hold er on the date of vesting

Second Appeal No 4889 of 1960 against the judgment and decree of Zaheer Hasan, Civil Judge, Varanasi in Civil Appeal No 398 of 1958 decided on 29th October, 1959

Krishna Shankar and *K N Gupta*, for the Appellants

Keshava Prasad Singh, for the Respondents

The following judgment of the Court was delivered by—

In this second appeal two questions have been referred to this Bench by a learned single Judge of this court The questions that we have to answer are

(1) For purposes of s 21(1)(*h*) of the U P Zamindari Abolition and Land Reforms Act, is the land

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HASINA BIBI v. RAM DIN

B Dayal J

holder the person who has instituted the suit under s 202 of the U P Zamindari Abolition and Land Reforms Act or a person who was the landholder on the material dates?

(2) Does s 21(1)(*h*) apply to a tenant, sub tenant or occupant, as the case may be where the land holder did not belong to any one or more of the classes mentioned in sub s (1) of s 157 of the U P Zamindari Abolition and Land Reforms Act on the date of vesting but belonged to such a class or classes both on the date of letting or occupation and on the 9th of April 1946

These questions have been referred to this Bench because the learned single Judge was of opinion that the interpretation put on the relevant provisions of s 21 of the U P Zamindari Abolition and Land Reforms Act by a Division Bench of this court in *Dularey* v *Rajeshwari* (1) need reconsideration The learned single Judge read that Division Bench case as indicating that the landholder under the provisions of s 21 mentioned above should be a disabled person on the date of vesting as well as on the date of letting and on the 9th April, 1946 The learned single Judge was of the view that under this section as now amended, it was not necessary to show that the landholder was a disabled person on the date of vesting also, and consequently, he disagreed with the Division Bench and referred the matter to a larger Bench

We have carefully read the aforementioned decision of the Division Bench and we think that the Division Bench did not lay down any such proposition that the landholder should be a disabled person on the date of vesting The Division Bench has merely laid down that s 21 of the Zamindari Abolition and Land Reforms Act is a section which confers new rights on tenants on the date of vesting and therefore, it speaks as on the date of

(1) 1966 A L J 199

vesting Therefore, the landholder about whom the question of disability has to be investigated should be the landholder who was in possession of that right on the date of vesting The learned Judges did not say that such a landholder ought to be disabled on that date, but merely stated that the landlord on that date must be the same person who was disabled on the earlier two dates namely the date of letting and the 9th April, 1946. We may quote the relevant portions from the judgment of his lordship the Chief Justice to indicate the above intention

> "In order to decide whether the petitioner became an asami under s 2(1)(h)(a) it has first to be determined who was his landholder immediately preceding the date of the vesting Since he acquired asami rights, if at all, on account of the vesting and with effect from the date of vesting, the provision has to be read as on the date of vesting In other words it has to be determined, as on the date of vesting, who was the landholder This is made clear by the use of the italicised words in the clause "if there are more than one landholder" Since s 21 is to be read as on the date of vesting, the use of the word "are" indicates that it has to be seen who was the landholder on the date of vesting If there was one landholder on that date he should have been a person belonging to any of the classes mentioned in s 157(1) on the date of the letting and also on the ninth day of April, 1946 If, on the other hand, there were two or more landholders on the date of vesting both or all should have belonged to any of the clauses at both the times"

It is therefore, quite clear that it was not held in this Division Bench case that the disability must continue upto the date of vesting

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We entirely agree, with due respect, with the decision of the Division Bench mentioned above, because the intention of the legislature seems quite clear that the benefit of the sub tenant remaining liable to ejectment as an Asami was intended to be given only to the land holder who was himself disabled on the date of letting as well as on the 9th April, 1946 and was not intended to be given to a transferee or successor of such disabled person. Originally as sub-s. (*h*) of s. 21 was introduced it required the disability to continue up to the date of vesting and it was, therefore, clear that on the date of vesting if the landholder was disabled, only then the sub tenant in possession would get only Asami rights otherwise he would become *Adhivasi* under s. 20 or a Sirdar under s. 19. Subsequently, the legislature thought that it was unfair to those disabled landholders whose disability ceased within three years before the date of vesting and who under the U. P. Tenancy Act s. 41(2) could maintain such a sub lease up to three years of the ceasing of disability, to deprive them of that right. Consequently the legislature amended sub-s. (*h*) of s. 21 by not requiring that the disability should continue up to the date of vesting but by merely requiring that the disability should continue up to the 9th April, 1946. But this does not mean that, during this period from the 9th April, 1946 and the date of vesting if the erstwhile disabled landholder, whose disability ceased on or after the 9th April, 1946, transferred his rights to an able bodied person, the benefit of this sub section would go to that transferee also. In order to ensure that the benefit of s. 21(1)(*h*) would go only to that very landholder who had originally let out the land in disabled condition and who continued to be disabled up to the 9th April, 1946, the legislature used the words "Where the landholder or if there are more than one landholder all of them were persons or ..." It is import

ant to note the use of the word "are" and then the use of the word "were" and also the use of the pronoun "them". The intention is that the landholders who are landholders on the date of vesting should be the very persons who were the landholders on the relevant dates, i.e. the date of letting on the 9th April, 1946. In this connection, it may also be noted that under sub-s. (2) of s. 41 of the U. P. Tenancy Act, such a sub-tenancy came to an end after three years of two different dates (1) the date of death of the disabled landlord and (2) the date of cessation of the disability and these two were treated as independent events and the date of death was not treated as the same as cessation of disability. S. 21 has provided for Asami rights in case of cessation of disability only and not in a case of death of the erstwhile landholder. In case of death the landholders on the date of vesting are necessarily different persons from those who were the landholders on the date of letting as well as on the 9th April, 1946. Agreeing with the Division Bench case, we answer the two questions as follows:

(1) For the purposes of s. 21(*h*) of the U. P. Zamindari Abolition and Land Reforms Act, the landholder is the person who was the landholder on the date of vesting.

Abolition and Land Reforms Act, both on the date. To make the position quite clear as we understand it,

(2) S. 21(1)(*h*) applies to a tenant or sub-tenant or occupant as the case may be where the land-tioned in sub-s. (1) of s. 57 of the U. P. Zamindari holder who files a suit does not require any considera- holder belonged to one or more of the classes men- we reiterate that the question of disability of the land of letting or occupation and on the 9th April, 1946.

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tion Any landholder may file a suit provided the tenure holder is an Asami and the tenant would be liable to ejectment if the landlord who let him in before 9th April, 1946 was a disabled landholder or if there were more than one, all of them were disabled landholders and he or they continued to be disabled on the 9th April, 1946 and even though their disability may have ceased, they continued to be landholder on the date of vesting If these three conditions are satisfied the tenant acquires only Asami rights and remains liable to ejectment Any landholder holding the land for the time being may sue within the period of limitation for his ejectment and would be entitled to a decree With these answers the papers will be returned to the learned single Judge who made the reference

Questions answered

SALES TAX REFERENCE

Before Mr Justice Manchanda and Mr Justice M H Beg

SALES TAX COMMISSIONER, U P — APPLICANT, 1966 September, 6

v

RAM KUMAR AGARWAL — OPPOSITE PARTY

U P Sales Tax Act, 1948, *s 2(h)—'Valuable consideration'—Meaning of—Whether* ultra vires*—If it covers bullion given for ready made ornaments—Nature of the transaction*

The words "valuable consideration' which do not find place in the definition of 'sale' in the Sales of Goods Act must be held to be *ultra vires* the scope of the State Legislature These words, at least can be interpreted, on the basis of the rule of *ejusdem generis* to mean payment by cheque bills of exchange or any such other negotiable instruments Thus where bullion is given in exchange for ready made ornaments the transaction would not be sale but an exchange or barter

Sales Tax Reference No 418 of 1962 under s 11(1) of the U P Sales Tax Act

Junior S C, for the Applicant

MANCHANDA, J —This is a case stated under s 11(1) of the U P Sales Tax Act (hereinafter referred to as the Act) The question referred is

> "Whether the giving of bullion by a dealer in exchange for purchase of ready made ornaments manufactured by goldsmiths is a sale' of bullion within the meaning of the U P Sales Tax Act or is a barter or exchange transaction and, accordingly, does not come within the purview of the said Act?'

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The facts lie within a narrow compass The assessee is a dealer in bullion and ornaments The relative assessment year is 1956 57 The assessee disclosed a turn over of Rs 2 05 lakhs for ornaments and Rs 160 014 for bullion The Sales Tax Officer rejected the accounts and determined the turnover at Rs 4 05 000 and apportioned this between the turnover of ornaments and bullion at Rs 2,00,000 and Rs 2,05,000, respectively Aggrieved by that order, the assessee filed an appeal to the Judge Sales Tax (Appeals), who reduced the turnover to Rs 3,80,000 (Rs 1,80,000 for ornaments and Rs 2 00,000 for bullion) Against this order both the Department and the assessee went up in revision According to the department, the small reduction in the gross turnover was unjustified On the other hand the assessee reiterated its contention that on the facts found by the Judge Appeals that it obtained new ornaments by giving in exchange bullion from his own stock plus manufacturing charges to the goldsmiths did not amount to a sale of bullion and as such that part of the transaction was not liable to sales tax and the Judge Appeals had erred in treating the bullion so given in exchange for the ornaments as suppression of sales of bullion The Judge (Revisions), rejected the appeal of the Department, and accepting the contention and appeal of the assessee, reduced the turnover of bullion by Rs 1,40,000 Hence, this reference at the instance of the Commissioner under s 11(1) of the Act

Mr *Raja Ram Agrawal*, learned Junior Standing Counsel contends, that in the circumstances of the case, bullion given in exchange for gold ornaments manufactured by Sunars was a "sale" by the assessee and even if it was only an "exchange" or "barter" it should, in the circumstances of the case, have been treated as a sale He relied upon a passage from Halsbury's Laws of England (Volume 34), Simonds Edition, page 5, para

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1 The relevant portion whereof reads "Sale is the transfer by mutual assent of the ownership of a thing from one person to another for a money price Where the consideration for the transfer consists of other goods or some other valuable consideration not being money the transaction is called exchange or barter, but in certain circumstances it may be treated as one of sale It was also contended that the definition of "sale" as given in the U P Sales Tax Act is much wider than that found under the Sale of Goods Act and therefore, even if no money consideration passed in the exchange of bullion for ornaments it would nevertheless be a 'sale' within the meaning of s 2 cl (*h*) of the U P Sales Tax Act as the transfer of bullion would be a valuable consideration for the transfer of the gold ornaments Cl (*h*) of s 2 reads

> "(*h*) *Sale*— This means within its grammatical variation and cognate expression any transfer of property for cash or deferred payment or other valuable consideration"

Bullion was undoubtedly, the stock in trade of the assessee's business and it was certainly not given as case for the purchase of ornaments and as such it might have been possible for the Department to contend that bullion was given as "other valuable consideration" within the meaning of s 2(*h*) of the Act The intention of inserting these words may have been to bring within the net of the Sales Tax Act all such transactions Such a view would appear to have been accepted by GOVIND MENON, J, as he then was in *Jaya Ram Chettiar* v *Judge Sales Tax* (1) by holding

> "Because of the words 'other valuable consideration' in the Madras General Sales Tax Act 1939 the scope and amplitude of the word sale was much larger than under the Sales of Goods Act 1930"

(1) 1 Sales Tax Cases 168

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It was further pointed out in that case that every sale under the Sale of Goods Act was certainly a sale under the General Sales Tax Act but every sale under the General Sales Tax Act will not come within the definition of the term under the Sale of Goods Act. The facts of that case were more or less similar to the facts of the present case and the Department could well have taken advantage of it but for a subsequent decision of the Supreme Court in the *State of Madras* v. *Cannon Dunkley and Co., Madras* (1). In that case the vires of the words other valuable consideration contained in the definition of Sale in the Madras General Sales Tax Act came up for consideration. After tracing the evolution of the law relating to the Sale of Goods from Roman Law to the time of the promulgation of the Indian Sale of Goods Act 1930 and the coming into existence of the Constitution of India it was held

> A power to enact a law with respect to tax on sale of goods under Entry 48 (in List II) Government of India Act 1935 must to be *intra vires* be one relating in fact to sale of Goods and accordingly the Provincial Legislature cannot in the purported exercise of its power to tax sales tax transactions which are not sale by merely enacting that they shall be deemed to be sales

> Sales tax was not a subject which came into vogue after the Government of India Act 1935. It was known to the framers of that statute and they made express provision for it under entry 48. Then it became merely a question of interpreting the words, and on the principle already stated that words having known legal import should be

(1) (1966) 9 Sales Tax Cases 558

constituted in the sense which they had at the time of enactment The expression sale of goods must be construed in the sense which it has in the Sale of Goods Act'

A contention based on the directive passage of Hals bury's Laws of England was also raised but it was repelled by the Supreme Court

In this view of the matter the words 'other valuable consideration' which occur in s 2(*h*) and which do not find a place in the definition of sale in the Sale of Goods Act, must be held to be *ultra vires* the scope of the Provincial or State Legislatures Those words, at best, can be interpreted on the basis of the rule of *ejusdem generis* to mean payment by cheque, bills of exchange or any such other negotiable instruments But they cannot possibly cover a case where no price is paid and the transaction is merely one of exchange or barter Therefore in the present case where gold bullion was an item of the stock in trade and it was exchanged for ornaments which also formed a part of the stock in trade of the assessee's business, it is difficult if not impossible to equate bullion with cash or coins, cheque or a negotiable instrument The definition of bullion is "uncoined gold and silver in mass' Bullion is not sovereigns or guineas and as such, particularly when it happens to constitute the stock in trade of the assessee's business it cannot be treated as cash or deferred cash payment within the meaning of s 2(*h*) of the Act and therefore will not satisfy the definition of 'sale in the Sale of Goods Act which has the same meaning as in the U P Sales Tax Act

It cannot be denied that if a person has gold lying at home and he gives it to the goldsmith to convert it into ornaments, no sale of gold takes place Then again if the assessee in the present case had given to

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the goldsmith the requisite quantity of gold lying with him before the ornaments were prepared, the transaction would not have amounted to a sale Merely, because gold ornaments when ready were brought to the assessee for purchase and he replaced the gold content thereof from his stock in trade will not alter the true nature or character of the transaction It is no doubt true, as pointed out by Lord GREENE, M R in *Hennik sen v Grafton Hotel* (1) that it frequently happens in Income tax Cases that the same result in the business sense can be secured by two different legal transactions one of which may attract tax and the other not This is no justification for saying that a tax payer who has adopted a method which attracts tax is to be treated as though he had chosen a method or device different from the other That principle however has no character and nature of the transaction whether the gold was given prior or after the manufacture of the ornaments remained the same The crux of the matter in either case would be that no price or deferred payment was made for the gold content of the ornaments purchased and as such would not be a sale within the meaning of s 2(*h*) of the Act Such an interpretation may prevent the Department from obtaining Sales Tax from the assessee twice over on the same quantity of gold or bullion once when it exchanges for equivalent weight of gold ornaments and again when the gold ornaments are sold by it but that cannot be helped in view of the law as it stands

For the reasons given above the question is answered by saying that the transaction was not a sale but only exchange or barter and therefore did not fall to be assessed within the meaning of s 2(*h*) of the Act The department will pay the costs of this reference to the assessee, which we assess at Rs 100

(1) (1943) 1 T R Suppl 10(C A)

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M H Beg J — The facts giving rise to this reference have been discussed fully by my learned brother MAN CHANDA, J in the answer given by him I would only like to add some reasons for coming to the same conclusion

The contentions of Mr *Raja Ram Agarwala*, appearing for the Sales Tax Commissioner seemed to us to imply that the definition of 'sale' in s 2(*h*) of the U P Sales Tax Act of 1948 (hereinafter referred to as the Act) is wider than the definition of sale in s 4 of the Sale of Goods Act The last mentioned provision defines a contract of sale of goods as one whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price Price is defined in s 2(10) of the Sale of Goods Act as 'money consideration for a sale of goods When asked whether his contention was that the definition of sale in s 2(*h*) of the Act was wider than the definition of 'sale of goods' found in the Sale of Goods Act Mr *Agarwala* frankly conceded that he could not put forward such an argument The reason for the position adopted by Mr *Agarwala* is clear It has been held by the Supreme Court of India in *the State of Madras* v M/s *Gannon Dunkerley and Co* (1) that the expression "sale of goods" is a *nomen juris*, and a power to tax "sale of goods" within the legislative competence of the Provincial Legislature, under the Government of India Act, 1935, which is relevant here, would not extend beyond the power to tax what is "sale of goods" in the legal sense The constitutional validity of this provision of the Act is neither before us nor can it be canvassed on a reference to this Court under s 11 of the Act after the view taken by their Lordships of the Supreme Court in *Venkataraman and Co* v *State of Madras* (2) Nevertheless, in deciding which of the

(1) A I R 1958 S C 560 (2) (1966) 60 I T R p 192

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two possible constructions of a legislative provision is to be adopted, I think we should prefer an interpretation which while it is reasonably acceptable also avoids constitutional invalidity. Such a rule of interpretation has been repeatedly laid down by the Supreme Court, even in those cases where violation of fundamental rights of citizens may be involved [See *Kedar Nath v. State of Behar* (1), *Govind Lalji v. State of Rajasthan* (2) and *Corporation of Calcutta v. Liberty Cinema* (3)].

Mr. *Agarwala* contended that since the definition of 'sale' in s. 2(*h*) of the Act, covers a transfer of property for cash as well as for other valuable consideration it must include such consideration as gold which was readily convertible into cash and was as good as cash. He went on to argue that such a meaning given to the term 'sale' found in s. 2(*h*) of the Act was within the scope of the definition of 'sale' in the Sale of Goods Act. The argument involves the addition of some explanatory words after 'other valuable consideration' such as 'which is readily convertible into cash'. We cannot add to or insert or read words into the statutory provision which may make the concept of sale wide enough to include barter pure and simple. The only reasonable way of interpreting the s. 2(*h*) of the Act without adopting a construction which may affect the constitutional validity of the definition as it stands is to construe the words 'other valuable consideration' *ejusdem generis* if that is possible. We have, therefore, to consider whether the *ejusdem generis* rule would apply here. That rule embraced within the principle of *noscitur a sociis*," was thus stated by Lord CAMPBELL in *R. v. Edmundson* (4) where there were general words following particular and specific words the general words must be confined to things of the same kind as

(1) A.I.R. 1963 S.C. p. 955
(2) A.I.R. 1963 S.C. p. 1638
(3) A.I.R. 1964 S.C. p. 1107
(4) (1859) 28 L. J. M.C. 213, 215

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those specified. By applying this rule the presumed intention of the Legislature is used to restrict the ambit of wide and general expressions.

It is evident that the Act itself is intended to deal with sales and not with transactions which are legally beyond the legal connotation of the term 'sale'. At least that is a legitimate presumption which can be overridden if the definition of 'sale' given in the Act goes clearly beyond its legal meaning. That legal meaning has become fixed, as pointed out by their Lordships of the Supreme Court in the *State of Madras* v. *Gannon Dunkerley and Co.* (1), I do not think that we can impute to the Legislature an intention to go deliberately beyond the legally fixed meaning of the term "sale" unless we are driven to such a conclusion by the language of the Statute.

The concept of sale was distinguished from barter or exchange long ago in our own ancient jurisprudence as well as in Roman Law. In Roman Law, "sale of goods" known as *emptio venditio* in which the title to the goods passed from the vendor to the purchaser, was a very different transaction from what was known as a '*specificatio*' of the kind in which the substance, such as gold with a goldsmith who converts it into an ornament, which was convertible back into its original form and shape by melting. In such a '*specificatio*' the ownership of the substance used remained with the person to whom the metal or other substance belonged. In the case before us there is no transaction such as the '*specificatio*' of Roman Law but the practice adopted by the assessee seems to be a convenient business usage designed to avoid the necessity of formal handing over of gold under contracts for piece work. The transactions with which we are concerned here are mere barters of

(1) A I R 1958 S C 560

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bullion for bullion together with the payment of wages for the work done by the goldsmiths. Neither in form nor in substance can such a transaction be looked upon as a sale in the legal sense of that term. There are no specific words used in s. 2(*h*) of the Act which may lead to the inference that such transactions which are beyond the purview of a sale, as it is ordinarily understood in law must be meant to be included here.

Mr. *Agarwala* tried to draw our attention to the varying definitions of the term 'sale' given in particular enactments in England. We are however not concerned here with any enactment where the term 'sale' may have a peculiar meaning for the purposes of that particular enactment. We are concerned with a rather general taxing statute which purports to deal with sales in their ordinary legal sense and which does not seem to go beyond that. The general legal conception of a sale is that of a transmutation of a property or a right from one man to another in consideration of a sum of money as opposed to barters, exchanges, and gifts.' [See *Gill* v. *Eagleton* (1) quoted at p. 58 in 'Words and Phrases' Vol. 38 West Publishing Co.]

The term 'money' has also a legal meaning as well as a popular sense both of which bar the inclusion of bullion or metal of any kind as such in the concept of 'money'. After all we are not concerned with what may pass for money in exceptional conditions or under the special usages and customs of a peculiar or commercially backward or primitive society. Legally speaking 'money' is just what is 'legal tender' or what a trades man is legally bound to accept under the law of the country. The term "money' is explained in the shorter Oxford English Dictionary as follows:

> 'In modern use applied indifferently to coin and to such promissory documents representing coin

(1) 157 N. W. P. 873.

(esp bank notes) as are currently accepted as a medium of exchange "

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The term 'cash' is narrower than "money' The words "deferred payment or other valuable consideration", used in s 2(*h*) of the Act, merely enlarge the ambit of the consideration beyond "cash", but they do not, in my opinion, carry it outside the scope of the term "money" The words "other valuable consideration' are general as compared with the two preceding more specific terms "cash" and "deferred payment" "Cash' and "deferred payment" are also considerations Hence, all the conditions for the applicability of the *ejusdem generis* rule are satisfied and the expression "other valuable consideration" can and must be interpreted restrictively here It seems intended to cover cheques and promissory notes or negotiable instruments which serve the purpose of "money" in modern commercial practice and usage and which can be included in the concept of "money"

For the reasons given above, I concur with the interpretation of the definition of "sale" in s.2(*h*) of the Act given by my learned brother

Question answered

APPELLATE CIVIL

Before Mr Justice Katju

MAHARAJ SINGH APPELLANT,

v

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BALJIT SINGH RESPONDENT

Easement *A co parcener of joint land owning a house exclusively and flowing water therefrom on co parcenary land—If can claim easementary right—His right if as of right'*

Where a person owning a house exclusively flowed water thereof on a land owned by several persons including himself and a dispute having arisen he filed a suit among others claiming a right of easement to flow water on the co-parcenery land held that he could claim the easement right as of right not withstanding that was one of the owners of the servient tenement

Ahqa Khatoon v *Aqila Bano* (1) followed

Second Appeal No 3785 of 1960 connected with Second Appeals Nos 3786 to 3788 of 1960 against the judgment and decree of A P Agarwal, Additional Civil Judge, Muzaffarnagar, in Civil Appeal No 251 of 1959 decided on 26th May, 1960

K C Agrawal, for the Appellant

Shanti Bhushan, for the Respondent.

KATJU, J —These are four Appeals arising out of a dispute between the parties with respect to five Parnalas

Admittedly the water from the Parnalas flows from the house of Maharaj Singh and falls down on the land which now admittedly belongs to Baljit Singh Maharaj Singh instituted suit no 669 of 1958 claiming an injunction restraining Baljit Singh from interfering with his right to flow water from the aforesaid Parnalas

(1) A I R 1956 All 415

It has given rise to Second Appeals Nos 3786 and 3788 of 1960 Baljit Singh instituted suit no 744 of 1958 He asked for an injunction restraining Maharaj Singh from interfering with his right to obstruct the flow of water falling from the Parnalas in dispute It has given rise to Second Appeals Nos 3785 and 3787 of 1960

The trial court held that Maharaj Singh was entitled to flow water from two Parnalas and dismissed the rest of the claim of Maharaj Singh It also dismissed Baljit Singh s claim with regard to the Parnalas for which Maharaj Singh's claim had been allowed Both the parties preferred appeals before the lower appellate court It allowed the appeals preferred by Baljit Singh and dismissed the appeals filed by Maharaj Singh The result was that while Maharaj Singh's suit was dismissed the suit instituted by Baljit Singh was partly decreed Maharaj Singh and Baljit Singh both have preferred second appeals to this court

Nand Kishor, Khoob Singh and Anup Singh were three brothers Nand Kishor had two sons Maharaj Singh and Damodar Prasad Baljit Singh purchased on 7th January, 1952 the interest of Khoob Singh and Anup Singh in the land over which the water from the Parnalas in dispute is discharged Admittedly the house from which the water from the Parnalas in dispute flows down belonged exclusively to Maharaj Singh There was a controversy with regard to the interest of Maharaj Singh in the land which is now owned by Baljit Singh and over which the water from the Parnalas in dispute falls down and flows through It appears that the aforesaid land belonged to the three brothers Nand Kishor, Khoob Singh and Anup Singh Maharaj Singh alleged that there was a partition between Nand Kishor and his brothers Khoob Singh and Anup Singh as a result of which the land now belonging to Baljit Singh had

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come to the share of Khoob Singh and Anup Singh The court below observed as follows

> "Thus I hold that Maharaj Singh has failed to prove the Batwara between Nand Kishor and his brothers and as such he has failed to prove that the water on the land in question was flowing as of right and as such it cannot be held that he has acquired prescriptive rights of easement to flow water on the land in question"

I am not quite satisfied with the finding of the lower appellate court that Maharaj Singh had failed to prove the partition between Nand Kishor and his brothers, but it is a finding of fact and is binding on me The fact is that the land over which the right of easement is claimed was coparcenery property Before its transfer in favour of Baljit Singh on 7th January 1952 when Maharaj Singh was a coparcener of the land over which easementary rights was claimed by him it could not be said that he had been exercising the right to flow water "as of right" It cannot be denied that a dominant owner could not claim an easementary right over land of which he himself is the owner The very concept of easementary right implies the exercise of the right by one person over the property belonging to another It was held by the court below that since Maharaj Singh was himself one of the owners of the servient tenement he could not claim any easementary right over it Learned counsel for Maharaj Singh strenuously argued that it could not be said that Maharaj Singh, under the circumstances of the case, could not claim the right to flow water over the land in dispute He argued that if the land in dispute before its transfer to Baljit Singh belonged to the coparcenery of which Maharaj Singh was one of the members, then even in that case it could not be said that he was the sole owner of the land in

dispute and there was no one else to resist his easemen tary claim over the said land Admittedly the house from which the water flows down belonged exclusively to Maharaj Singh Even if he was a member of the coparcenery the said house was his exclusive property If water was being discharged through the Parnalas in dispute over the coparcenery land, then certainly it was open to the other coparceners to challenge the right of Maharaj Singh to flow water from the house which was not coparcenery property, but which belonged exclu sively to Maharaj Singh Maharaj Singh is the owner of the house and he did not possess any right to flow water on the said land even if it was coparcenery property of which he was a member

Learned counsel relied on a single Judge decision of this Court in *Atiqa Khatoon* v *Aqila Bano* (1) in which Mr *Justice Upadhya* observed as follows

> "The essential ingredient of '*animus*' is there if the servient tenement does not belong to the per son claiming the easement absolutely and if the ex ercise of the right is capable of being resisted If that land over which the easement is claimed be longs to another person also, that other person is certainly affected injuriously by the exercise of a right of way over the land and to that extent the person exercising the right is obviously doing an act detrimental or prejudicial to the rights of the other owner"

I respectfully agree with the aforesaid observation In the present case, water from the two Parnalas had been flowing for over 20 years on the land in dispute and it must be held that Maharaj Singh had acquired a pres criptive right of easement to flow water on the land in dispute

(1) A I R 1956 All 418

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Katju J

Learned counsel for Baljit Singh referred to a single Judge decision of the Oudh Chief Court in *Majid Husain* v *Fayaz Husain* (1) WAZIR HASAN, J C, approved the following rule of law laid down by Mitra on his book on limitation

> "The nature and character of the servient land the friendship or relationship between the servient and dominant owners and the circumstances under which the user had taken place, may induce the Court to hold that the enjoyment was not 'as of right although there is no direct proof that the enjoyment was had with the permission of the servient owner"

In the present case water flowed down from the house belonging exclusively to Maharaj Singh over the land which belonged to the joint family of which he was a member There is nothing to suggest that the water from the house of Maharaj Singh could have flowed from any other direction If the coparceners permitted the discharge of water from Maharaj Singh s house from the coparcenery land they must have clearly understood that it would later on take the shape of an easementary right I have no hesitation in holding that the right in dispute enjoyed by Maharaj Singh was 'as of right' The trial court had decreed Maharaj Singh s suit only with regard to the Parnalas Learned counsel for Maharaj Singh challenged the finding of the trial court with regard to the remaining Parnalas I am not prepared to go beyond the finding of the trial court

The result is that the appeals filed by Maharaj Singh, viz Second Appeals nos 3786 and 3788 of 1960 are partly allowed and the suit is decreed in terms of the decree passed by the trial court The appeals preferred by Maharaj Singh, viz Second Appeals nos

(1) A I R 1936 Oudh 257

3785 and 3787 of 1960 are dismissed Suit no 744 of 1958 instituted by Baljit Singh is decreed in terms of the decree passed by the trial court The parties will pay and get costs in all the appeals in proportion to their success and failure in the suits throughout

Ordered accordingly

CIVIL MISCELLANEOUS

Before Mr Justice Broome and Mr Justice Satish Chandra

1966 JODHAN PETITIONER,

September 30

v

THE BOARD OF REVENUE U P AND OTHERS

OPPOSITE PARTIES

Code of Civil Procedure, 1908 *s* 11—*General Doctrine of* res judicata—*Applicability and scope—Decision by civil court—If can operate as* res judicata *in suit in revenue court—former suit and subsequent suit,—Whether the date of decision or institution is to be decided*

S 11, C P C is applicable only to cases where both the earlier proceeding and the later proceeding which is said to be barred by the earlier one are civil suits whereas in cases in which neither of the two proceedings or only one of them is a civil one the general doctrine of *res judicata*, shorn of the limitations imposed by s 11 is to be applied

Revenue courts are courts of special limited jurisdiction belonging to an entirely seperate heirarchy and cannot be equated with civil courts Therefore, s 11, C P C would not apply but the general doctrine of *res judicata* would apply to create the bar

To decide whether a suit is a former suit it is the date of decision and not the institution which has to be considered.

Civil Miscellaneous Writ Petition No 2246 of 1961

R B Misra, for the Petitioner

S C, *Satya Prakash* and *Radhey Shyam*, for the Opposite parties

The following Judgment of the Court was delivered by—

BROOME, J —This writ petition filed by Jodhan, which has been referred to us for decision at the instance of S N SINGH, J, challenges a decision given by the

Board of Revenue on 30th May, 1961 in a second appeal arising out of a suit under s 176 of the Zamindari Abolition and Land Reforms Act, confirming the appellate decision of the Additional Commissioner, Gorakhpur, dated 2nd December, 1960

The plots in suit were originally held by one Ghulaman, who left two sons, Salik (father of the petitioner Jodhan and O P 6 Natha) and Lochan (father of O P 4 Ramdhari) On Ghulaman s death property was recorded in the name of Lochan alone, and when Lochan and Salik died a dispute arose between their sons, Ramdhari (son of Lochan) claiming to be the sole tenant, while Jodhan and Natha (sons of Salik) claimed that they were entitled to a half share in the plots in question On 20th March, 1957 Jodhan and Natha filed this suit for partition under s 176 of the Zamindari Abolition and Land Reforms Act, which was decided in their favour by the Assistant Collector, First Class on 16th August, 1960 Meanwhile Ramdhari on 18th July, 1957 had filed a suit in the civil court for a permanent injunction to restrain Jodhan and Natha from interfering with his possession of the disputed plots (and in the alternative for possession of the plots) and that suit was dismissed, in respect of the plots with which we are at present concerned, by the First Additional Munsif of Deoria on 11th January, 1960, with the finding that the plaintiff Ramdhari was not the exclusive *sirdar* of these plots Ramdhari filed no appeal against the Munsif's decision, which therefore became final between the parties He did, however, appeal against the decision of the Assistant Collector in the partition suit and that appeal was allowed on 2nd December, 1960, in respect of the plots now in dispute, by the Additional Commissioner, who held that the plots in question belonged exclusively to Ramdhari and that Jodhan and Natha

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Srivastava J.

had no share therein The suit for partition filed by Jodhan and Natha thus stood dismissed, and this decision was confirmed by the Board of Revenue by means of the impugned second appeal order dated 30th May, 1961

The contention now advanced by the petitioner Jodhan (which was also taken by him before the Commissioner and before the Board of Revenue) is that the defence of Ramdhari in the partition suit to the effect that he was the sole *sirdar* of the disputed plots was barred by the principle of *res judicata*, in view of the earlier decision given against him by the First Additional Munsif of Deoria on 11th January, 1960 which had become final between the parties This plea was repelled by the Board of Revenue on the ground that the civil court had no jurisdiction to try the subsequent suit for partition of the holding and consequently the civil court judgment could not operate as *res judicata* under s 11, C P C

The fundamental question that calls for determination in this case therefore is whether a decision given by a civil court in a civil suit can operate as *res judicata* in a revenue suit subsequently decided by a revenue court, in which the same matter is directly and substantially in issue S 11, C P C is couched in the following terms

> "11 No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

It is clear that in the case that we are now considering the conditions demanded by this section are not satisfied, for the civil Court which gave the earlier decision did not have the jurisdiction to try the subsequently decided revenue suit Consequently, on a strict application of the terms of s 11, the decision in the earlier civil suit could not operate as *res judicata* to bar the trial of the subsequent suit in the revenue Court. It is argued on behalf of the petitioner, however, that in a situation like this the restricted rule enunciated by s 11, C P C should not be applied but the subsequent revenue suit should be held to be barred by the earlier civil Court decision on the basis of the general principles of *res judicata*

When considering this question of whether the strict terms of s 11 C P C or the wider principles of the general doctrine of *res judicata* apply to a case like the present, we are faced with an unfortunate discordance, if not contradiction, in the rulings cited by the parties in support of their respective contentions In *Bhagwan Das* v *Mst Reoti Devi* (1) the Supreme Court held that a revenue Court decision on a question of title did not operate as *res judicata* in a subsequent civil suit, because the conditions required by s 11, C P C (viz that the court trying the earlier suit should be competent to try the subsequent suit) were not satisfied, and the general principles of *res judicata* were not permitted to be invoked Again, in *Jankirama Iyer* v *Nilakanta Iyer* (2) which dealt with a case involving two successive suits in the civil courts, it was observed

> "When s 11 is thus inapplicable it would not be permissible to rely upon the general doctrine of *res judicata* We are dealing with a suit and the only ground on which *res judicata* can be urged

(1) A I R 1952 S C 287 (2) A I R 1959 S. C 688.

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Broome J

against such a suit can be the provisions of s 11 and no other'

On the other hand, in *Gulab Chand* v *State of Gujarat* (1) it was held that a civil suit was barred upon general principles of *res judicata* by an earlier decision on the merits in a writ petition and the Supreme Court remarked

> We are of opinion that the provisions of s 11, C P C, are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res judicata* in a subsequent regular suit It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject matter The nature of the former proceeding is immaterial'

It is difficult to reconcile this latter case of *Gulab Chand* (1) with the earlier decision given by the Supreme Court in *Bhagwan Das* v *Mst Reoti Devi* (2) holding s 11, C P C to be attracted in a case where a revenue court decision was followed by a civil suit dealing with the same questions of title That case has not been referred to or discussed in the later ruling, but by implication would appear to have been overruled It is to be noted that when deciding *Bhagwan Das's* case (2) their Lordships did not embark on any discussion of the applicability of the general principles of *res judicata* to such a case, but remarked that it was "not necessary to

(1) A I R 1965 S C 1153. (2) A I R 1962 S C 187

consider the differences between the scope of the principle of *res judicata* covered by s 11, of the Code of Civil Procedure and that of the principle of *res judicata* dehors the said section"

The view that now holds the field appears to be that s 11, C P C is applicable only to cases where both the earlier proceeding and the later proceeding which is said to be barred by the earlier one are civil suits, whereas in other cases in which neither of the two proceedings or only one of them is a civil suit the general doctrine of *res judicata*, shorn of the limitations imposed by s 11, is to be applied This view finds expression in the following passage from *Gulab Chand* v *State of Gujarat* (1)

> "The Code was dealing with procedure of the Civil Courts only and had therefore, not to consider what would be the effect on the trial of suit in view of the provisions of other enactments or of general principles of *res judicata* or of any other kind It had to restrict its provision about *res judicata* to the effect of decisions in a civil suit on a subsequent civil suit and therefore, enacted s 11 in the form in which we find it It made one of the conditions for the application of a previous decision to operate as *res judicata* to be that the previous decision is made not only by a Court competent to make it but by a Court which may be competent to try the subsequent suit This condition must have been considered necessary in view of the observations of the Privy Council in *Misir Raghobardial's* case (2), and on account of the hierarchy of Courts under the various Acts constituting Courts of Civil Judicature and it could have been felt that a decision by a Court which is not competent to decide the subsequent suit be not treated of a binding nature

(1) A I R 1965 S C 1153 (2) 9 Ind App 197 (P C)

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Broome, J

Such an exceptional procedure seems to have been provided as a matter of precaution as the Court not competent to try the subsequent suit must necessarily be a Court of inferior jurisdiction and therefore, more liable to go wrong Whatever the reason may be, the provisions of s 11 will govern a previous decision in a suit barring a subsequent suit with respect to the same matter in controversy and general principle of *res judicata* in such particular circumstances will neither be available to bar a subsequent suit nor will be needed"

It is true, as has been pointed out in the dissenting judgment of SUBBA RAO, J, that the rule that has been laid down in this case of *Gulab Chand* (1) gives rise to anomalies, for it implies that a decision in a previous civil suit that does not certify the stringent conditions of s 11 C.P.C will not operate as *res judicata* in a subsequent suit, whereas a decision in a proceeding that is not a suit will be *res judicata* whether it satisfies the conditions of s 11 or not But that cannot be helped in the conflict between the terms of s 11 and the general principles of *res judicata*, anomalies of one kind or another are inevitable, and the only way to avoid them would seem to be to re enact s 11 in some wider and less restrictive form

Applying the rule enunciated above to the facts of the present case, we find that s 11, C P C is not applicable and that the case is governed by the general doctrine of *res judicata*. The decision of 11th January, 1960, was no doubt given by a civil court in a civil suit, but the subsequent decision of 16th August, 1960, was by a revenue court in a revenue suit Revenue courts are courts of special limited jurisdiction, belonging to an entirely separate hierarchy and cannot be equated with

(1) A I R 1965 S C 1153

civil courts, and only certain provisions of the Civil Procedure Code have been made applicable to revenue suits (vide Chap IX of the U P Land Revenue Act and Appendix I to the Revenue Court Manual) If, therefore, s 11, C P C is concerned solely with the effect of decisions in a civil suit on a subsequent civil suit, it cannot govern the effect of the decision in a civil suit on a subsequent revenue court decision

BROOME J

The Board of Revenue was thus wrong in holding that the Munsif's decision of 11th January, 1960, could not operate as *res judicata* in the subsequently decided revenue suit on the ground that the requirements of s. 11, C P C had not been satisfied In the circumstances of this case the general principles of *res judicata* would apply and the Munsif's decision would bar the defence taken by Ramdahni in the revenue suit, despite the fact that the Munsif had no jurisdiction to try the latter suit

The Additional Commissioner had repelled the plea of *res judicata* on other grounds, but these are clearly untenable He was of opinion that the Munsif's decision could not operate as *res judicata* because the suit in which it was given had been filed later than the revenue suit But it is the date of decision that counts, not the date of institution, and the Munsif decided the civil suit on 11th January, 1960, whereas the revenue suit, though instituted earlier, was not decided until 16th August, 1960 The civil suit, having been decided earlier, is the 'former suit' for the purposes of *res judicata* while the revenue suit, decided later, is the "subsequent suit' The Additional Commissioner also thought that the Munsif's decision could not operate as *res judicata* because the civil courts had no jurisdiction at that time to decide Sirdari rights The fact is however that the decision was fully within jurisdiction The

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question of Sirdari rights was referred by the Munsif to the revenue court under s 332 of the Zamindari Abolition and Land Revenue Act and the finding given by the revenue court on this point were accepted by the Munsif and incorporated in his final decision An attempt has been made to argue before us that s 332 had been deleted at the relevant time, but we find that it was not deleted until 7th November 1958, whereas the reference had been made to the Revenue Court on 30th January, 1958, (as is clear from the certified copy produced by the petitioners)

We are satisfied therefore, that both the Additional Commissioner and the Board of Revenue were wrong in holding that the Civil Court decision of 11th January 1960, could not operate as *res judicata* This petition is accordingly, allowed with costs and the impugned orders of 2nd December, 1960 and 30th May 1961, are quashed (with the result that the decree of the Assistant Collector dated 16th August, 1960, is restored)

Petition allowed

APPELLATE CIVIL

Before Mr Justice Oak

MUNSHI LAL AND OTHERS — APPELLANTS

v.

NASIR — RESPONDENT

1968

October 8

U P (Temporary) Control of Rent and Eviction Act *III of* 1947 *ss* 2(d) *and* 3—*Permission granted by an authority other than District Magistrate—No evidence that he was authorised by District Magistrate—Presumption of such authorisation—It can be made—Indian Evidence Act,* 1872 *s* 114(e)

Notice—Service by post—Notice under s 106 *Transfer of Property Act sent by post—Presumption of service—Endorsement of refusal by postman—Proof of correctness of—Plea of—Waiver when not to be allowed—Transfer of Property Act* 1882 *ss* 106 *and* 113—*General Clauses Act,* 1897, *s* 27

There is a presumption that judicial or official acts have been regularly performed under s 114(e) Evidence Act. Where the authority granting the permission was not disputed in the pleadings nor in the earlier proceeding for granting of permission that the presumption may be drawn that there was authorisation as contemplated under s 2(d) of the Act

Though the initial burden of proving it lies on the plaintiff but he having produced an order, it shifted to the defendant to rebut the same

Wherever a communication is sent by post there is presumption of its due delivery and where returned with the endorsement 'rejected' there will be a presumption of tender by postal authority, notwithstanding that the postman was not produced

Where a plea of waiver was neither taken nor was an issue framed it was disallowed in appeal

Second Appeal No 1263 of 1964 from the Judgment and decree of M M H SIDDIQUI, Additional Civil Judge, Bulandshahr, in Civil Appeal No 427 of 1963 decided on 11th March, 1964

A Banerji, for the Appellant

7 AD

1966

MUNSHI LAL v. NAZIR

OAK, J —This second appeal by plaintiffs arises out of a suit for ejectment and arrears of rent Munshi Lal and others are the owners of the house in suit Nazir defendant occupied the house as their tenant on a monthly rent of Rs 7 50 The plaintiffs obtained permission from the Rent Control and Eviction Officer, Bulandshahr for filing a suit of ejectment against the defendant The plaintiffs case is that they served upon the defendant a notice to quit, and later filed the present suit for his ejectment and to recover arrears of rent The defendant pleaded that the permission granted by the Rent Control and Eviction Officer was invalid This plea was overruled by the learned Additional Munsif, Bulandshahr, who tried the suit He held that the permission secured by the plaintiffs is valid The court, therefore, passed in plaintiffs' favour a decree for ejectment of the defendant and for the recovery of Rs 19 75 on account of arrears of rent There was also a direction for payment of damages

Nazir defendant appealed The appeal was allowed by the learned Additional Civil Judge, Bulandshahr He dismissed the plaintiffs' suit Munshi Lal and other plaintiffs have come to this Court in second appeal

The question for consideration is whether the defendant is liable to ejectment The trial Court held that the defendant was liable to ejectment But the learned Additional Civil Judge differed from the trial Court on this point The lower appellate Court has given three reasons for reversing the decree of the trial Court The three reasons are (1) it has not been proved that the Rent Control and Eviction Officer had been duly authorised to grant permission for filing suits for ejectment, (2) it has not been proved that notice to quit reached the defendant, and he refused to accept the notice, (3) the notice to quit was later waived by the landlord by accept-

ing rent from the tenant These three points may be dis cussed one by one It was stated in the plaint that the plaintiffs secured permission from the Rent Control and Eviction Officer, Bulandshahr On this point, it was pleaded in para 5 of the written statement that the per mission obtained by plaintiffs was invalid We may therefore take it that the plaintiffs did obtain permis sion from the Rent Control and Eviction Officer, Buland shahr The question for consideration is whether the permission was invalid as alleged by the defendant

S 3 of the U P (Temporary) Control of Rent and Eviction Act (hereafter referred to as 'the Act) provides for the grant of permission by the District Magistrate The expression "District Magistrate" has been defined in cl (*d*) of s 2 of the Act "District Magistrate in cludes an officer authorised by the District Magistrate to perform any of his function under this Act The ques tion, therefore, arises whether the officer concerned was duly authorised as contemplated by cl (*d*) of s 2 of this Act

Sri C B Dixit appears to have granted the permission in question There is on the record no document to prove definitely that Sri Dixit had been authorised under cl (*d*) of s 2 of the Act. The question arises whether we may presume that Sri Dixit had been so authorised

In *Mahabir Prasad Litha* v *The Purulia Electric Sup ply Corporation Ltd* (1) it was held that there is no pre sumption by which a delegation of powers could be pre sumed That case arose out of criminal proceedings The decision of the criminal case turned on the ques tion whether the Chief Electrical Inspector had been duly authorised or not The court declined to draw a presumption in favour of the prosecution In a civil proceeding the Court would be more willing to draw the necessary presumption under s 114 of the Evidence Act.

(1) A I R 1968 Cal 661

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MUNSHI LAL
v.
NASIR

Oak J

According to cl (e) of s 114 of the Evidence Act, the Court may presume that judicial and official acts have been regularly performed It is not denied that Sri C B Dixit was an officer attached to district Bulandshahr We may presume that Sri C B Dixit s official acts have been regularly performed

In *Govind Ram Thaper* v *Hari Ram* (1), the defendants pleaded that the permission secured by the plaintiff was by an officer who was not authorised by the District Magistrate to perform functions under the Act Permission was granted by Sri B R Sharma The actual order passed by the District Magistrate authorising Sri Sharma to perform any functions under the Act was not on the record It was held that the order granting permission was passed by an officer who had no authority to make the order granting permission It will be noticed that in that case the defendants expressly pleaded that the permission was granted by an officer who was not authorised by the District Magistrate to perform his functions under the Act In the present case, there is no such express plea in the written statement In para 5 of the written statement there is the vague plea that the permission is invalid Now, permission can be invalid for a variety of reasons The suit may not relate to accommodation at all The suit may relate to a building constructed after 1st January 1951 From the written statement it is not clear on what ground the defendant was challenging the validity of the permission Thus the facts in the present case are somewhat different from those in *Thapar's* case

In *M A Rafiq* v *Smt Maya Devi* (2) it was held that the initial burden of proving that the suit is filed with a valid permission is on the landlord who would fail if he does not produce any order giving permission, but after such an order has been produced the burden would shift on the defendant who would fail if after production of

(1) 1966 A L R 725 (2) 1968 A L R 927

an order purporting to have been passed by an authority he produces no evidence in support of his allegation that the officer had in fact an authority I respectfully agree with that view

In the present case the permission by Sri Dixit is not at present on the record Mr *A Banerji* appearing for the appellants states that the permission was filed before the trial court Any way, the fact that some such permission was secured by the plaintiffs was not disputed by the defendant The tenant filed a revision against Sri Dixit's order The revision was dismissed by the Additional Commissioner, Meerut Ex 2 is a copy of the Additional Commissioner s order dismissing that revision A perusal of Ex 2 shows that the tenant did not dispute before the Additional Commissioner Sri Dixit s competence to grant permission in proper case There is no good reason for supposing that Sri Dixit acted without the necessary authority under s 2(*d*) of the Act We may therefore presume that Sri Dixit had been duly authorised for granting permission under s 3 of the Act

The next question for consideration is whether there was a valid notice to quit under s 106, T P Act Munshi Lal plaintiff gave a statement on this point He stated that he sent a notice to the defendant. Ex 3 is a copy of the notice The defendant declined to accept the registered notice Ex 4 is the envelope so returned Sri *Kishan Chand* Vakil signed the registered notice

Mr *K B L Gaur* appearing for the respondent urged that the copy Ex 3 is not admissible in evidence The point is not of importance, because the registered notice is on the record That notice is contained in the envelope (Ex 4) The learned Civil Judge remarked that the contents of Ex 4 were not known The point should not have presented any difficulty I opened the envelope

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MUNSHI LAL v. NABH

Oak J

(Ex 4) in this Court I found a notice within the envelope (Ex 4) I compared the contents of that document with the copy (Ex 3) The documents completely tally.

The next question is whether the notice reached the defendant, and he refused to accept it The postman was not produced by the plaintiffs on this point There is however, an endorsement on Ex 4 by the postman indicating refusal by the defendant.

In *Wasu Ram* v *R L Seth* (1) it was held that whenever a communication is sent by post there is a presumption that it was duly delivered or tendered If the communication is returned by the post office with the endorsement 'Refused', the presumption will be that it was tendered by the postal authorities in their ordinary course of business to the addressee who refused

The learned Civil Judge tried to distinguish the present case form *Wasu Ram's* case (1) on the ground that that was a case of money order whereas the present case is one of a registered letter I do not think that difference is material for the purposes of the principle laid down in *Wasu Ram's* case (1) That principle will apply whether the refusal is endorsed on the back of a registered letter or on the money order form Even in the absence of the postman in the witness box the lower appellate court should have drawn the appropriate presumption from the endorsement on Ex 4

The defendant gave his statement on oath, and denied having refused to accept any such letter At the end of point no 2, the learned Civil Judge observed

> "In the circumstances, I believe the defendant who stated on oath that he did not receive any notice from the plaintiff"

(1) 1968 A W R 473

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MUNSHI LAL v. NASIR

Oak J.

Mr *Gaur* contended that this finding of fact is binding on this Court in second appeal It is true that whether the notice reached the defendant or not is a question of fact But the finding recorded by the learned Civil Judge on point no 2 is vitiated by his failure to draw the necessary presumption from the envelope (Ex 4) Nazir defendant is an interested witness One cannot place much reliance on his statement In view of the endorsement on the envelope (Ex 4) it should be presumed that this envelope did reach the defendant, and he declined to accept the letter Service of notice has been duly proved

Under point no 3 the learned Civil Judge held that the notice in question was later waived by the plaintiffs by accepting rent from the defendant It is true that the plaintiff did say something about receiving money order from the defendant But no specific question was put to the plaintiff as to whether he had waived the notice No plea of waiver was raised by the defendant before the trial court There was no issue on the question of waiver framed by the trial court Waiver is largely a question of fact The learned Civil Judge was wrong in entertaining the question of waiver for the first time in appeal before him The plaintiffs' claim cannot be defeated on the principle of waiver Thus all the three reasons given by the learned Civil Judge for dismissing the plaintiffs' claim are unsound

The Second Appeal is allowed I set aside the decree passed by the learned Additional Civil Judge, Bulandshahr, and restore the decree passed by the trial court The plaintiffs appellants shall get their costs from the defendant respondent in all the three Courts The defendant is permitted to remain in possession of the house in dispute for a period of three months from today

Second Appeal allowed.

SALES TAX REFERENCE

Before Mr Justice Manchanda and Mr Justice M H Beg

1966 October, 7

MESSRS D S BIST & SONS — APPLICANT

v

THE COMMISSIONER OF SALES TAX — OPPOSITE PARTY

U P Sales Tax Act, 1948, ss 11(1) 21 and 7—Rule 41(5)— *Appellate Court remanding case to Sales Tax Officer—His power to include a turnover under s 21—*

Where in an appeal the assessment is set aside and the case is remanded with direction for re assessment the Sales Tax Officer acquires all the powers available to him under s 7 and r 4(5) in relation to original assessment In such circumstance the assessment continued pending S 21 will apply only if the assessment has already been completed and became final There fore in the absence of such finality the Sales Tax Officer cannot take action under s. 21

Sales Tax Reference no 134 of 1964 under s 11(1) of the U P Sales Tax Act.

S C Khare for the Applicant

S C, for the Opposite party

The following judgment of the Court was delivered by—

MANCHANDA, J —This is a case stated under s 11(1) of the U P Sales Tax Act (hereinafter referred to as the Act) The question referred is

> "Whether under the circumstances of the case when the controversy remanded by the Judge (Revisions) Sales Tax was only with respect to 28,875 sleepers as to whether its price was to be excluded on account of sale being ex-U P physical delivery

or not, there having been no scrutiny about the correctness or otherwise of the turnover by the Assessing Authority as also by the Judge (Appeals) Sales Tax and consequently no observation about its correctness or otherwise by the Judge (Revisions) Sales Tax was it open to the Sales Tax Officer to have taken additional information into consideration so as to enhance the turnover on the basis of that information to the tune of Rs 43 00,000 without taking recourse to s 21 of the Sales Tax Act with respect to the alleged escaped turnover?

The material facts are these the assessee is a dealer in tea as also of timber extracted from forest taken on contract The relevant year of assessment is 1950 51 The assessing authority fixed the turnover of tea at Rs 76,422 and odd and the net turnover of timber at Rs 26 00 000 The dealer went up in appeal challenging the inclusion of the sale of tea in the turnover on the ground that it was exempt being a horticultural produce In respect of the turnover of timber it was claimed that 28,875 sleepers priced at Rs 3 42 203 were exported by way of sale outside U P, and therefore, the turnover determined by the assessing officer required to be reduced by the aforesaid sum of Rs 3 42,203 The Judge (Appeals) accepted both these contentions and deleted the turnover of tea from the assessable turnover and also reduced the turnover of timber to Rs 23,00 000 and odd Against this the Department went up in revision The Judge (Revisions) upheld the deletion of the turnover in respect of the sales of tea but with regard to the turnover in respect of 28,875 timber sleepers, he was of the view that the original contracts for the sale thereof made by the assessee with the railways and the D G I & S and the relevant correspondence in that connection should be examined He, therefore ordered as follows 'the application be partly allowed The appellate order is

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v.
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Manchanda
J.

set aside The case is remanded for certain enquiries as directed in the judgment with respect to the sales of sleepers for Railways as also those sold to the D G I & S Fresh assessment shall then be made in respect of them, if they are found to be liable' Thereafter, the Assessing Authority made an assessment under r 41(5) of the Sales Tax Rules The Sales Tax Officer pointed out in assessment order In view of the above directions, the assessees were called in August, 1957, but the case was postponed to September on their request as they wanted time to produce certain documents The case was adjourned to September They again wanted time to obtain certain documents from the Forest Department The case was finally fixed for hearing on 24th September 1958 No body turned up on this date A letter was received from the assessee saying that they had already filed some copies of the requisite papers relating to various supplies They expressed their inability to produce the relevant original important records of the year under consideration as they were misplaced and were not traceable by them They further requested that the case be decided *ex parte* In view of the assessees own request, the assessment is being made *ex parte* There are no papers on record to show the nature of the agreements entered into by the assessee with the various parties regarding supplies inside U P or outside U P There is a mention of an agreement in the assessment order passed by my predecessor originally on 18th April, 1953 in which he had mentioned that all the timber meant for Railways and supplies through the Forest Department was sold in U P as the agreement was between the Government U P and the assessee In the absence of appearance of the assessee and in the absence of production of original documents, the turnover will have to be determined on the basis of material available on record It has been discovered that for the year under considera

tion the sales of timber were shown at Rs 42,67,388 by the assessee according to the return filed by them with the Income Tax Department which according to the income tax assessment related to the year 1951 52 Their turnover is therefore fixed at Rs 44,00 000 at a round figure '

Against this assessment order passed after remand the assessee again went up in appeal and contended (1) that there could be no *de novo* assessment by the Sales Tax Officer and the turnover fixed in the original assessment prior to remand could not be enhanced, and, (2) that the assessment on higher turnover was unwarranted because they were not apprised of the information which the Sales Tax Officer intended to use against them The Judge (Appeals) accepted the contention that the remand by the revisional court was only for the disposal of a particular point and the turnover could not have been enhanced beyond what the Sales Tax Officer had originally determined According to him the only question which was left open to the assessing officer was in respect of timber sales amounting to Rs 3,42,208 It however appears that he gave the assessee an opportunity of showing that the material in the shape of an income tax return for the relevant year of assessment showing a turnover of Rs 48 lakhs and odd was not relevant for the purpose of sales tax assessment for the assessment year 1951 The Judge (Appeals) was apparently satisfied that the income-tax return and the assessment filed by the assessee were irrelevant In this connection he observed However the assessee also produced necessary evidence to show that the figures on which the S T O has relied were not relevant for the purposes of assessment for the year 1950 51 Aggrieved by this order the Department went up in revision The assessee was the respondent before the Judge (Revisions) The Judge (Revisions) remark

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Manchanda J

The dealer has not disputed the correctness of the information received by the S T O or denied that the turnover mentioned by the S T O was not mentioned in the income tax returns He has only challenged the competency of the S T O to take that information into consideration In other words, the correctness of the turnover given in the income tax proceedings for the assessment year 1951 52 was no longer challenged either on the ground that they did not relate to the same period which was not covered by the assessment order under the Sales Tax Act or on the ground that the income tax returns filed were incorrect The challenge was only to the jurisdiction of the Sales Tax Officer to take those income tax returns into consideration in assessment proceedings under the Sales Tax Act The finding that was given by the Judge (Appeals) on the merits as to whether the turnover in the returns filed in the income tax proceedings related to the same period covered by the Sales Tax assessment, was abandoned or at least not pressed The Judge (Revisions), therefore only decided the legal issue which was pressed before him as to whether after remand though in respect of a particular item the Income Tax Officer was competent to include therein certain other turnover which had not been included in the assessment made before it was set aside and the case remanded According to him, as the turnover returned by the dealer was originally accepted by the Sales Tax Officer and none of the authorities had applied their mind as to whether the turnover return was correct or not, it was open to the Income Tax Officer on remand to include such turnover which had not been included in the assessment originally made He therefore, set aside the order of the Judge (Appeals) on this point and restored the order of the Sales Tax Officer fixing the taxable turnover at Rs 43 lakhs Hence, this reference at the instance of the assessee

It was contended by the learned counsel for the assessee that the real question was as to whether adequate opportunity before enhancing the turnover was given by the Sales Tax Officer to meet the material in the shape of the income tax return for the assessment year 1951 52 which had been discovered by him It is conceded that the assessee permitted the assessment on remand to be made *ex parte* by not producing the original contracts or any other correspondence But, it is contended that the concession should be restricted only to the item upon which the Sales Tax Officer was directed by the Judge (Revisions) to investigate and assess or not to assess the turnover of Rs 3 42 000 in respect of the timber sales depending on whether they were ex U P sales or not The question of adequacy of opportunity would not arise out of the order of the Judge (Revisions) As already observed the Judge (Appeals) had given the assessee an opportunity and was satisfied that the material relied upon by the Sales Tax Officer in the shape of the income tax returns filed by it were not relevant in these proceedings But when it came in revision the assessee did not urge that the finding given by the Judge (Appeals) on merits should not be disturbed The assessee was content with urging the purely legal aspects as to the scope of the remand order and the jurisdiction of the Income tax Officer to make an assessment thereafter In the application under s 11(1) too no grievance was made of the fact that the Judge (Revisions) had wrongly stated that the only point challenged by the assessee was as to the legality of the increase made in the turnover by the Sales Tax Officer upon remand There is also no such mention in the statement of the case The question referred would also indicate that the question was being confined simply to the question whether, in the circumstances of the case, it was incumbent upon the Sales Tax Officer to take proceedings under s 21 of

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the Act even when the matter was remanded and a fresh assessment had yet to be made In these circumstances it is not possible to accede to the submission of the counsel for the assessee that the question should be reframed so as to include therein the question as to whether there was failure to furnish adequate opportunity to meet the material used by the Sales Tax Officer against it

The question, therefore which falls to be considered relates only to the jurisdiction of the Sales Tax Officer upon remand to include therein the turnover which he had not included at the time of the original assessment as he had no knowledge of such turnover at that time or whether in such circumstances it was obligatory on him to take action under s 21 of the Act It is no doubt true that the Judge (Revisions), when he made the order of remand, had only in mind the precise point which was argued before him and that was whether there was any material to hold that the sales of timber valued at Rs 3,44,000 were sales within U P or ex U P The direction, no doubt, was that this aspect should be investigated The Judge (Revisions), however, did not remand the matter for determination of that specific issue or the specific point but went on to direct that a fresh assessment shall be made In other words he set aside the remand which had already been made Once the remand made was set aside and a fresh assessment had been to be made then all the powers which the Sales Tax Officer had under s 7 or r 41(5) at the time when he made the original assessment would again be available to him The opportunity that s 7 requires is that "before taking action under this sub s (3) the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any returns submitted by him" That opportunity was given to him, but he refused to avail of it Beyond that no further opportunity under the Act was required to be given to him In the present

case the material discovered was an income tax return filed by the assessee itself The assessee cannot contend that he was taken by surprise by the Sales Tax Officer pressing into service the return filed by the assessee himself In any event, if any further opportunity was required, the Judge (Appeals) had given that opportunity to the assessee and, therefore, it is no longer open to him to contend that the provisions of s 21 of the Act should have been applied or that some further opportunity to be heard should have been given It has not been pointed out to us that the assessee had any explanation to offer of the turnover shown by himself in his income tax return Apparently the assessee himself did not desire any further opportunity to be heard lest he is placed in the embarrassing position of having to explain the admission made by him before the Income tax authorities

There is in our judgment no scope for taking action under s 21 of the Act when an assessment for whatsoever reason is still not final and is pending S 21 of the Act will only apply if the assessment under s 21 has already been completed and become final, then only it is possible to say that some turnover has escaped assessment but if the original assessment itself is not complete or final it will not be open to the Sales Tax Officer to take action under s 21 of the Act If in such circumstances when an original assessment order had been set aside so that the assessment was still pending the Sales Tax Officer had proceeded to take action simultaneously under s 21 of the Act, the assessee would have been the first to complain that this amounts to harassment as there is already an assessment pending, and, therefore, there can be no question of any escapement of turnover from assessment

The view that is being taken is supported by certain observations made by the Supreme Court in *Ghanshyam*

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Dass v *Regional Assistant Commissioner of Sales Tax,* (1)

> A proceeding is said to be pending as soon as it is commenced and until it is completed On the said analogy, the assessment proceedings under the Sales Tax Act must be held to be pending from the time the said proceedings were initiated until they were terminated by a final order of assessment Before the final order of assessment it could not be said that the entire turnover or a part thereof of a dealer had escaped assessment, if the assessment was not completed, and, if completed, it might be that the entire turnover would be caught in the net

In *Suwa Lal Pooran Mal* v *Commissioner, Sales Tax U P* (2), it was observed ' To us it appears that when in appeal the decision of a lower court is set aside and the case is remanded by the higher court for decision in accordance with the directions given by that court, the lower court is restored to its original jurisdiction and it can only pass such orders as it was originally competent to pass A remand order containing directions cannot be said to confer upon a lower court any new jurisdiction or special jurisdiction "

Again in *J K Cotton Spinning and Weaving Mills* v *Commissioner of Income tax* (3), this Court observed When an Income Tax Officer makes a fresh assessment in compliance with the Appellate Assistant Commissioner s directions he is of course bound by the directions, but subject to them he has the same powers as he had originally when making an assessment under s 23 (In come Tax Act) The re assessment is nothing but a second assessment in substitution of the assessment made previously and set aside by the Appellate Assistant Commissioner on appeal There are no restrictions at all on

(1) A I R 1964 S C 766 (2) (1963) 14 S T C 456 at p 469
(3) (1963) 47 I T R 906

the powers of the Income tax Officer when he proceeds to re assess the income, subject to the directions given in the Appellate Assistant Commissioner s order, he has to proceed as if he were making an assessment under s 23 at the time when he proceeds to re assess He is not bound or restricted by anything that had happened either when he made the original assessment or when the appeal was heard by the Appellate Assistant Commissioner, he is governed only by the findings of the Appellate Assistant Commissioner

In the present case the Sales Tax Officer complied with the directions of the Judge (Revisions) inasmuch as he determined whether the sale to the tune of Rs 34,00,000 were ex U P or not but having done that, his further powers under s 7 or r 41(5) did not in any way stand curtailed and it must be held that he had the jurisdiction to determine the turnover at a figure other than what he had assessed before the matter was remanded

For the reasons given above, the question is answered in the affirmative and against the assessee The assessee will pay the costs of this reference which we assess at Rs 100

Question answered

INCOME TAX REFERENCE

Before Mr Justice Manchanda and Mr Justice M H Beg

1968
October 10

MAHARAJA VIBHUTI NARAIN SINGH
APPLICANT

v

THE STATE OF U P
OPPOSITE PARTY

U P Agriculture Income Tax Act, 1948 *ss 2 5 and 6—Agricultural income—Assessment under s 5 if to be on the actual realisation or on total rental demand— Deemed to be the sum realised" in s 5—Interpretation of—Income from nursery, agricultural income*

The word deemed in the expression deemed to be the sum realised in s 5 is used only in view of the deductions to be made from actual realisations The word deemed is not used in that section to negative the natural meaning of the words which clearly indicate that the assessment must take place on the actual realisation made and not on the demands made The word derived used in the definition of agriculture in s 2 also means actually derived and not notionally derived

Whether a nursery would be an agricultural operation will depend on whether it is maintained as an aid or necessary adjunct to the primary process of agriculture carried on by a farmer or it is maintained and run as a business quite independently of agriculture

C I T v Raja Benoy Kumar Sahas Roy (1) referred

Miscellaneous Agriculture Income Tax Reference no 191 of 1964 under s 24(4) of the U P Agricultural Income Tax Act

R D Agarwal and *Gopal Behari*, for the Applicant

V P Tewari and *S C*, for the Opposite party

The following judgment of the Court was delivered by—

M H BEG, J —The assessee, Maharaj Vibhuti Narain Singh of Varanasi, was assessed under ss 5 and 6

(1) 32 I T R 466

of the U P Agricultural Income Tax Act, 1948 (here inafter referred to as the Act) on an income of Rs 34,437 12 9 for 1362 *fasli* and of Rs 37,794 13 4 for 1363 *fasli* by the assessing authority He appealed on the ground that he had been assessed on a wrong basis that the whole of the rental amount due to him as rent had been realised by him by the cultivators, whereas s 5 of the Act only provided that 'the agricultural income mentioned in cl (*a*) of sub s (1) of s 2 shall be deemed to be the sum realised in the previous year on account of agricultural income" The Additional Commissioner who heard the appeal from the assessment order dated 29th February, 1956 relating to the year 1362 *fasli* did not consider the question of law raised but he held that in view of the practice of assessing agricultural income tax on the basis of rental demand instead of actual realisation 'it was not advisable at the stage to take the realized rent for the purpose of income tax The Additional Commissioner also observed that the assessee, being a Raja, had a big staff and was 'expected to collect the whole amount demanded especially when it was realised from the city dwellers' Another ground of appeal taken by the assessee was that the income of Rs 1 588 had been wrongly added to the agricultural income of 1362 *fasli* although this should have been excluded as it was not agricultural income The assessee pointed out that he had already been taxed by the income tax authorities on this income This ground succeeded before the Additional Commissioner who deleted this amount from the total agricultural income of 1362 *fasli* The assessee's appeal from the assessment order dated 31st January, 1957 relating to the year 1363 *fasli* was heard by the Commissioner before whom the Additional Commissioner's judgment relating to the assessment of 1362 *fasli* seems to have been placed The Commissioner agreed with the Additional Commissioner that the total rental demand should be

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the basis of the assessment under s 5 of the Act, but he disagreed with the Additional Commissioner on the question whether the income of the nursery should be computed as agricultural income under s 6 of the Act, although it is not clear why the Commissioner considered the question of income from the nursery at all as it was not assessed to tax under the Act for 1363 *fasli* Consequently there were revision application by both sides The revising authority agreed with the view taken by the Commissioner Varanasi and rejected the revision application filed by the assessee, but it allowed the revision application filed by the State so that the item of Rs 1,538 was added to the income of the year 1362 *fasli* which was the income from the nursery treated as agricultural income by the assessing authority As the revising authority known as the Revision Board', rejected the assessee's application for a reference, under s 24(2) of the Act, the assessee came to this Court under s 24(4) of the Act This Court then required the Revision Board to state the case on two questions of law which in the opinion of this Court arose in the case These questions were

(1) Whether there was any material before the Revision Board for holding that the entire amount of the current rental demand should be taken as agricultural income from the rent?

(2) Whether the income from the nursery constitutes the agricultural income?

In stating the case to this Court the Revision Board has observed that s 5, with s 2(*a*) of the U P Agricultural Income tax, supported the view that agricultural income was to be computed on the basis of the actual realisation of rent and not the total rental demand' The Revision Board noticed the contention of the assessee s counsel that the Board had ordered agricultural income to be computed on the actual realisation for the

years 1359 and 1360 and 1361 *fasli* It, however, did not give a finding whether this was actually done in the case of the assessee or not The Revision Board then gave a rather dubious finding that the practice in the past had been to compute the assessee s agricultural income on the basis of the total rental demand of rent for the sake of convenience We are unable to hold that any practice or convenience can alter the law If as the Revision Board itself seemed to think the law required computation on the basis of actual realisation of rent and not on the basis of the total rental demand the Revision Board ought to have given effect to the requirement of law as against any alleged practice or convenience which could have no bearing on what the law actually autho rises or requires

It was contended on behalf of the State of U P that the concession by the Revision Board that the basis of assessment should be the actual realisation and not the total rental amount is erroneous Reliance was placed upon the definition of agricultural income given in s 2 of the Act which may be fully quoted here as it is neces sary to consider it in answering both the questions before us The definition is as follows

> (*a*) any rent or revenue derived from land which is used for agricultural purposes and is either assess ed to land revenue in Uttar Pradesh or is subject to a local rate or cess assessed and collected by an offic er of the State Government
>
> (*b*) any income derived from such land by—
>
> (i) agriculture or
>
> (ii) the performance by a cultivator or receiv er of rent in kind of any process ordinarily em ployed by a cultivator or receiver of rent in

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kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii)

Emphasis was placed on behalf of the State on the words "derived from land" used to indicate taxable income. It was contended that s. 5 also uses the words "deemed to be the sum realized" so that "realization" meant whatever income was derived from land and that this would be deemed to have been actually realized. This appears to be a very unnatural interpretation. Even if we look at the word "derived" it certainly does not mean "deemed to be derived". S. 5 only deals with the determination of the amount after making certain deductions which will be deemed to be the sum realized in the previous year on account of agricultural income. The word "deemed" is used only in view of the deductions to be made from actual realizations. These deductions are set out under six categories (*a*) to (*f*) in s. 5. The word "deemed" is not used here in order to negative the natural meaning of the words which clearly indicate that the assessment must take place on the actual realizations made and not on the demands made. The word "derived" also means actually derived and not notionally derived.

The second question to which we may now turn is more difficult. Analysis of the above mentioned definition of agricultural income given in the Act will show that this income must be derived from actual user of land. S. 2(1)(*a*) is confined to rent or revenue received but s. 2(1)(*b*) covers wider classes of agricultural income. The first of these classes covers income of those engaged

in the profession of agriculture carried on upon land by themselves or through others who cultivate for them The next class is of those who engage in the actual process of cultivation which may result in agricultural income This process is indicated as any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market It appears to us that the process which is employed by a person carrying on agriculture, either as a direct cultivator or as a person employing others to cultivate, must be carried on upon land and not on earth contained in earthen pots as is the case with a large number of processes in a nursery It also appears to us that the process involved must result in some produce which is raised directly for being taken to the market Further, we find that in s 2(1)(*b*)(ii) the process contemplated is one ordinarily employed by a cultivator such as cultivation of fields with ploughs The definition of agricultural income' given here is, therefore a rather technical and restricted one It does not include all kinds of income which may result from carrying on an activity embraced by the broad sense of the term agriculture

It is true that the dictionary meaning of the term agriculture is wide enough to cover all that may lie within the province of the science or art of cultivating the soil and may include even allied activities such as rearing of live stock The Supreme Court in *C I T* v *Raja Benoy Kumar Sahas Roy* (1) while interpreting the abovementioned definition which is taken from the Indian Income Tax Act, 1922, made an exhaustive survey of the various decisions on the meaning of the term agriculture and came to the following conclusion

> "As we have noted above, the primary sense in which the term agriculture is understood is agar-

(1) 32 I T R 466

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field, and cultra cultivation, i e the cultivation of the field, and if the term is understood only in that sense agriculture would be restricted only to cultivation of the land in the strict sense of the term meaning thereby tilling of the land, sowing of the seeds, planting and similar operations on the land They would be the basic operations and would require the expenditure of human skill and labour upon the land itself There are however other operations which have got to be resorted to by the agriculturist and which are absolutely necessary for the purpose of effectively raising the produce from the land They are operations to be performed after the produce sprouts from the land, e g weeding digging the soil around the growth, removal of undesirable undergrowth of all operations which foster the growth and preserve the same not only from insects and pests but also from depredation from outside, tending pruning, cutting, harvesting and rendering the produce fit for the market The latter would all be agricultural operations when taken in conjunction with the basic operations above described and it would be futile to urge that they are not agricultural operations at all But even though these subsequent operations may be assimilated to agricultural operations, when they are in conjunction with these basic operations could it be said that even though they are divorced from these basic operations they would nevertheless enjoy the characteristic of agricultural operations? Can one eliminate these basic operations altogether and say that even if these basic operations are not performed in a given case the mere performance of these subsequent operations would be tantamount to the performance of agricultural operations on the land so as to

constitute the income derived by the assessee there from agricultural income within the definition of that terms ?

We are of opinion that the mere performance of these subsequent operations on the produce of the land, where such products have not been raised on the land by the performance of the basic operations which we have described above would not be enough to characterise them as agricultural operations In order to invest them with the character of agricultural operations these subsequent operations must necessarily be in conjunction with and a continuation of the basic operations which are the effective cause of the products being raised from the land It is only if the products are raised from the land by the performance of these basic operations that the subsequent operations attach themselves to the products of the land and acquire the characteristic of agricultural operations

Their Lordships held that subsidiary operations such as digging the soil must be subordinate and incidental to the primary operations of cultivation of fields in order to be embraced within the term agriculture It is only then that the subsidiary operations will be comprised within the definition of agriculture as defined above They went on to hold that all activities in relation to the land or having connection with the land, including breeding and rearing of livestock, dairy farming, butter and cheese making, poultry farming etc 'could not be covered in this technical definition of agriculture although the wider dictionary meaning may embrace it They went on to point out that there has to be present throughout the basic idea that there must be at the bottom of it cultivation of land in the sense of tilling the land sowing of seeds, planting and similar work done on the land itself They said this basic

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conception is the essential *sine qua non* of any operation performed on the land constituting agricultural operations'

In view of the exhaustive discussion by the Supreme Court of the criteria to be adopted in deciding whether an activity can be described as an agricultural operation or not there is no need for us to go into this matter at length It is true that there is no decision so far brought to our notice on the question whether the maintenance of a nursery is included within the scope of agriculture technically defined It may be that applying the above mentioned tests laid down by their Lordships of the Supreme Court cases may arise in which a nursery may be maintained by a farmer as an aid or necessary adjunct to the primary process of agriculture carried on by him But, usually nurseries are maintained and run as businesses quite independently of agriculture and there may be no process carried on upon the land at all in running a nursery There are *inter alia* two meanings of the term nursery given in Oxford Dictionary which are relevant here One of these is 'A piece of ground in which young plants or trees are reared until fit for transplantation Another meaning given which is not so common, is 'a collection of such plants' Any place where young plants are "reared and kept is spoken of as a nursery The keeping and running of a nursery as a business does not generally involve the ordinary processes of cultivation in fields at all

In the present case, we do not find any discussion of the type of nursery involved Even if the keeping of a nursery necessarily means the use of some land and earth for the purposes of rearing plants that would not by itself amount to carrying on a primary agricultural operation in the sense of cultivating fields Moreover plants or seeds are not considered "produce ready for the market' in the ordinary sense We do not also

know the facts upon which the income tax authorities have treated the income from the nursery as income from a business It is only clear that the materials before the agricultural income tax authorities in the case before us were wholly insufficient to justify the conclusion that the income from the nursery was agricultural income No facts which could give rise to an inference that there was a nursery were discussed Perhaps the income tax authorities went into the matter in a more satisfactory manner before they determined the income from the nursery to be income from a business However we have not even got any order or judgment of the income tax authorities before us All we can say with certainty is that the materials before the agricultural income tax authorities could not justify the conclusion that the income from the nursery in this case constituted agricultural income

The result is that our answers to both the questions are in the negative and in favour of the assessee Accordingly we allow costs of this reference to the assessee and fix it at Rs 100 We also allow and assess counsel's fee at Rs 100

Questions answered

APPELLATE CIVIL

Before Mr Justice Verma and Mr Justice R Prasad

RAMESH CHANDRA (APPELLANT)

v

MUSAMMAT MAHADEVI AND ANOTHER

(RESPONDENTS)

1967

January 4

Indian Limitation Act, (*IX of*) 1908 *Sch I Arts 91 and 141—Invalid alienation of a Hindu widow—Suit by reversioner after death of widow—Whether barred by 3 years rule of limitation as to cancellation of instruments*

It is not necessary for a reversioner to seek declaration or cancellation of an unauthorised or illegal alienation by a Hindu widow during her life time It is open to him to wait till her death when the reversion vests in him and then to sue for the recovery of the property in question Such a suit will be subject to 12 years rule of limitation under Art 141 and not to that of 3 years under Art 91

Code of Civil Procedure (*Act V of*) 1908 *s 11 Expl IV s 146 O 22 r 4(2)—Finding on a point directly in issue in former suit—Plea taken up but not pursued in former suit—Whether operates as* res judicata—*Pleas available to legal representative—Whether limited to those open to the deceased*

The finding in the former suit that X and Y were separate and not members of a joint Hindu family would operate as *res judicata* in the subsequent suit So also where the plea of the invalidity of a family settlement was taken but not pursued in the former suit its trial in the subsequent suit will be barred on the principle of constructive *res judicata*

It is not open to the legal heir and legal representative of a deceased party to take any plea which was not available to the deceased There is nothing in Hindu Law to militate against this rule or in s 146 of the Code of Civil Procedure to show that it is inconsistent with and to that extent overrides the provision to that effect (the rule aforesaid) made under O 22 r 4(2) of the Code

Hindu Law—*Suit by or against Karta—Whether binds coparceners—Family settlement by life owner for her and on behalf of minor reversioner, where she is not the natural guardian and*

contracts to enlarge the life estate at the cost of the reversioner, —Whether binds the minor

According to the principles of Hindu Law a Karta particularly the father under the Mitakshara School of Hindu Law can sue and be sued in his own name in respect of rights and interests of the joint Hindu family or in respect of transactions entered into in his own name Such a decision would bind the co parceners and they cannot re agitate the same matter by a fresh suit

A family settlement entered into by a limited owner for her and on behalf of the minor co parcener would not bind the latter where she was not the natural guardian of the minor and the settlement purported to enlarge the life estate at the cost of the reversionary interest

First Appeal No 72 of 1954 against the order of MURLIDHAR, P C S , Civil Judge Agra, dated 30th November 1953

J Swarup and *V P Misra*, for the Appellant

Brij Lal Gupta, Bhagwan Das and *Ashok a Gupta*, for the Respondents

The following judgment of the court was delivered by—

R PRASAD J —This is a first appeal filed by Sri Ramesh Chandra plaintiff against the judgment and decree dated 30th November 1953 in Suit No 4 of 1941 of the Court of Civil Judge Agra Originally, the suit was filed against B Sukhbasi Lal who died during the pendency of the suit in the court below Shrimati Mahadevi widow of Sukhbasi Lal and B Shyam Behari Lal *alias* Ram Babu, son of the deceased were brought on record as defendants 1 and 2 in the capacity of legal representatives of the deceased B Sukhbasi Lal The properties involved in the suit are four in number and are detailed in Schedule A of the plaint The plaintiff prayed for a decree for possession over the properties in suit and a decree for past mesne profits as well as

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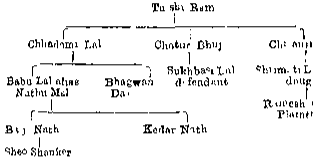
R. Prasad J.

mesne profits, *pendente lite* and future mesne profit till the date of delivery of possession over the properties in suit to the plaintiff

A short pedigree was disclosed in the plaint. With a view to appreciate the facts of the case, it is necessary to reproduce that pedigree at this stage:



The allegations made in the plaint are that Lala Chiranji Lal, the maternal grandfather of the plaintiff was the exclusive owner of considerable immovable and movable properties and that he died on 21st January 1929. Shrimati Laeti Devi, the daughter of Chiranji Lal succeeded to the estate of Chiranji Lal, after his death as his heir under the Hindu Law. Laeti Devi had been married to one Sri Raja Ram and the plaintiff is son of Raja Ram through Shrimati Laeti Devi. B. Sukhbasi Lal was a Vakil practising at Agra for over thirty years and was also a standing counsel for Lala Chiranji Lal. He yielded considerable influence on Lala Chiranji Lal and he obtained from plaintiff's mother Shrimati Laeti Devi a document on 3rd March, 1929 on incorrect facts and by exercise of undue influence over her. Shrimati Laeti Devi plaintiff's mother was a *pradanashin* lady, inexperienced and entirely helpless. She did not receive any independent advice with regard to the above document. B. Sukhbasi Lal repudiated

the transaction evidenced by the aforesaid document in Suit No 15 of 1932 which was a suit filed by B Sukhbasi Lal against Shrimati Laretu Devi in the court of Civil Judge, Agra The document, therefore, had no force, and at any rate it was void and ineffective as against the plaintiff During the course of the mutation proceedings consequent to the death of Lala Chiranji Lal B Sukhbasi Lal repudiated the said document on 3rd March, 1929, and this was followed up by Suit No 15 of 1932 mentioned above B Sukhbasi Lal in the aforesaid Suit No 15 of 1932 claimed that Lala Chiranji Lal formed a joint Hindu family with him and that plaintiff's mother did not inherit the estate of Chiranji Lal The decision arrived at in Suit No 15 of 1932 was that Lala Chiranji Lal and B Sukhbasi Lal were not members of a joint Hindu family at the time of the death of Lala Chiranji Lal It has been asserted by the plaintiff that Lala Chiranji Lal was a separate sole member of his family and that the plaintiff's parents lived with Lala Chiranji Lal as soon as they were married Lala Chiranji Lal was a simple person and B Sukhbasi Lal acted as his vakil and he used to give Lala Chiranji Lal advice from time to time In case Lala Chiranji Lal is shown to have made any statement or evinced a conduct which could be used for showing that he was joint the same was really never made consciously for that purpose Any such statement or conduct of Lala Chiranji Lal must be deemed to be the result of wrong advice by B Sukhbasi Lal with a view to create evidence for his own benefit Long before the death of Lala Chiranji Lal, there had been a separation amongst the descendants of Lala Tulshi Ram the common ancestor Shrimati Laretu died on 27th April 1948 and that, therefore the plaintiff was entitled to file the suit It was then alleged that B Sukhbasi Lal succeeded in obtaining possession over some of the immovable properties belonging to Lala

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Chiranji Lal on the death of Lala Chiranji Lal, and that the plaintiff was entitled to get back possession over such properties by filing the instant suit B Sukhbasi Lal had also taken over considerable movable properties belonging to Lala Chiranji Lal deceased but the plaintiff reserved the right to bring a separate suit in respect thereof, and for that purpose a separate application for leave under O 2 r 2 of the Code of Civil Procedure was filed The plaintiff valued his claim for mesne profits tentatively at Rs 2 000 and undertook to pay court fee in respect of such other amount of mesne profits as may be found due to him on accounting

Lala Sukhbasi Lal contested the suit and filed a written statement on 16th April, 1941 He admitted the pedigree shown in the plaint He also admitted the date of death of Lala Chiranji Lal It was denied that Lala Chiranji Lal was possessed of any exclusive properties and it was alleged that Lala Chiranji Lal and the defendant were joint owners of the properties in suit, of which B Sukhbasi Lal became owner by survivorship on the death of Lala Chiranji Lal Shrimati Laresi Devi could not and did not succeed to the rights of Lala Chiranji Lal on his death The defendant did not admit that he was a standing counsel of Lala Chiranji Lal or that he exercised any influence over him It was also denied that the deed of family settlement dated 3rd March, 1929 was obtained under any undue influence or of any wrong or incorrect representations Plaintiff's mother was not helpless, inexperienced or *pardanashin* It was also incorrect that she did not receive any independent advice or that B Sukhbasi Lal repudiated the aforesaid deed of 3rd March, 1929 The deed was never given a go by, nor was the same void or ineffective It was further alleged that B Sukhbasi Lal did not repudiate the aforesaid deed in the mutation

proceedings Suit No 15 of 1932 was filed on the basis of the family settlement The decision of the trial court in Suit No 15 of 1932 was not binding on B Sukhbasi Lal defendant as an appeal from the said decision was then pending in the Hon ble High Court Lala Chiranji Lal was not a simple man as alleged by the plaintiff, nor did he make any incorrect statement of jointness either, under any advice of the defendant B Sukhbasi Lal but whenever he made such statement he stated the truth In fact, Lala Chiranji Lal had never separated from B Sukhbasi Lal B Sukhbasi Lal was in rightful possession over the properties in suit and the plaintiff was not entitled to any *mesne* profit Lala Chiranji Lal constituted a Hindu joint family with defendant B Sukhbasi Lal at the time of the death Their business and properties were joint In case any statement is proved to have been made which would go to show separation between defendant B Sukhbasi Lal and Lala Chiranji Lal such a separation was only notional or nominal, and not a legal partition and further, in case any such separation is proved, then the defendant's case was that there was a reunion between Lala Chiranji Lal and B Sukhbasi Lal and that Lala Chiranji Lal died as a member of a Hindu joint family The defendant B Sukhbasi Lal was not a very successful lawyer and Lala Chiranji Lal was the head of the family The defendant B Sukhbasi Lal always acted according to the directions of Lala Chiranji Lal On the death of Lala Chiranji Lal, defendant B Sukhbasi Lal became the owner of the whole property by survivorship and the father of the plaintiff instigated the mother of the plaintiff to set up false claim Lala Sukhbasi Lal defendant in order to avoid dispute and litigations agreed to give to the plaintiff's mother some property and a sum of Rs 10,000 in cash The plaintiff's parents were in narrow circumstances and B Sukhbasi Lal defendant was

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pressed by the relations as *biradri* people to show indulgence to them. The family settlement was a voluntary act on the part of Shrimati Laeti Devi. She acted under the advice of her husband and well wishers and the arrangement was also acted upon by the plaintiff's mother. Shrimati Laeti Devi was an intelligent woman well versed in worldly affairs and was also educated. She did obtain advice from legal practitioners before executing the aforesaid deed. Taking inspiration from erroneous order of revenue court in the mutation proceedings the plaintiff's parents resiled from the family settlement. In view of such conduct of Shrimati Laeti Devi defendant B. Sukhbasi Lal was constrained to file a suit against Shrimati Laeti Devi. Shrimati Laeti Devi made false allegations with regard to the family settlement. Defendant B. Sukhbasi Lal for the purposes of that case also relied on his original rights irrespective of the family settlement. The family settlement was a settlement of disputed claims entered into *bona fide* under the advice of well wishers and relations and after fully understanding its implications, and that, therefore, the plaintiff was not entitled to claim anything beyond what his mother obtained under the family settlement. The properties in suit were joint family and ancestral properties. The plaintiff did not have any share right, or interest therein. B. Sukhbasi Lal in the alternative pleaded in the written statement that in case the family be not held to be joint or admitted the properties in suit with the exception of Rawatpura property, were acquired with joint funds of himself and Lala Chiranji Lal and that the plaintiff in any case could not claim the whole of them. In case the family was not joint, it was defendant B. Sukhbasi Lal, who was the sole owner of Rawatpura property, as it was he who had paid entire consideration for the purchase of that property and it was he, who had rebuilt the same after the

death of Lala Chiranji Lal If the court found that Lala Chiranji Lal was not a member of Hindu Joint Family with the defendant B Sukhbasi Lal, then in that event defendant B Sukhbasi Lal was the owner of half of the other properties in suit, and that the plaintiff could not in any event recover more than half in those properties and that too on the condition of his restoring half of the property, which he got under the family settlement and on repayment of Rs 10 000 Suit was said to be barred by s 10 of the Code of Civil Procedure as well as by principles of estoppel and acquiescence Further, the claim of the plaintiff was barred by time inasmuch as neither the plaintiff nor his predecessors were in possession of properties in suit within 12 years of the institution of the suit The other defence raised is that the suit was bad for non joinder of Ram Babu

As stated above, B Sukhbasi Lal died during the pendency of the suit and his son Ram Babu and his widow Shrimati Maha Devi were brought on record as defendants Ram Babu filed a fresh written statement on his behalf on the 18th March, 1947 He claimed to be the owner of the entire property alleged to be left behind by late Lala Chiranji Lal in his own right and also under a will duly executed by him on the 16th October 1926 It may be mentioned that the words in his own right and also were added in his written statement by way of amendment by order dated 11th August, 1951 Ram Babu alleged that the plaintiff did not have any right in the estate of Lala Chiranji Lal and that he was in possession of some of the immovable properties left by Lala Chiranji Lal in his own right and with respect to the other properties which was in the possession of the plaintiff, he had already filed Suit No 8 of 1947 According to him B Sukhbasi Lal was deadly against him Any arrangement or litigation between B Sukhbasi Lal and Shrimati Laeti Devi could not affect his

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rights In the alternative, Ram Babu pleaded that the suit properties were joint properties of Lala Chiranji Lal and B Sukhbasi Lal at all material times, in which Lala Chiranji Lal and B Sukhbasi Lal had equal interest and the interest of B Sukhbasi Lal devolved on Ram Babu by right of survivorship on the death of B Sukhbasi Lal The second alternative case taken by Ram Babu was that B Sukhbasi Lal had paid Rs 11,000 for the purchase of the house situate in Rawalpura Agra and had further invested a sum of Rs 20 000 in the reconstruction of the said property B Sukhbasi Lal had further paid a sum of Rs 10 000 to Shrimati Laden Devi at the time of the family settlement in the year 1929 in which the interest of the plaintiff was represented by her In addition to the above items B Sukhbasi Lal had also paid a sum of Rs 21,000 to Babu Lal and others of the branch of B Chhadammi Lal as a consideration for the properties left joint with Lala Chiranji Lal and B Sukhbasi Lal in the year 1911 as then joint *qua* Unless the above noted sums were properly adjusted the plaintiff was not entitled to get any relief It was further alleged that after the separation of the share of the branch of Lala Chhadammi Lal in 1911, properties left with Lala Chiranji Lal and B Sukhbasi Lal jointly, including accretions and improvements thereto and the properties mentioned in the family settlement of 1929, were those which existed in 1911 excepting the property of Kacherighat Agra which was acquired in 1924 with joint funds Defendant Ram Babu, therefore, claimed to possess proprietary rights in them on such basis also He also alleged that the plaintiff's claim was barred by time

On 3rd May 1947, Shrimati Mahadevi also filed a separate written statement The defence taken by her is in line with the defence taken by Ram Babu She further alleged that the suit was barred by principles of *res judicata* The family settlement dated 3rd March,

1929, was not obtained by fraud or undue influence or without independent advice

On the 16th May, 1947, a supplementary written statement was filed by Ram Babu and it was alleged that as between the descendants of Chhidammi Lal on one side and B Sukhbasi Lal and L Chiranji Lal on the other, there had been a partition of the ancestral joint Hindu family properties by a registered deed dated 16th August, 1911, and the properties in suit fell into the lot of B Sukhbasi Lal and Lala Chiranji Lal jointly This being so, properties in the hands of B Sukhbasi Lal were ancestral so far as Ram Babu was concerned It was also alleged that the family settlement was binding on the plaintiff inasmuch as Shrimati Laeti Devi who represented the estate of Lala Chiranji Lal did not get the said document set aside within three years and it therefore, became effectual and binding Shrimati Laeti Devi from time to time derived benefit under the said document and relied on the same It was, therefore, not open to the plaintiff to challenge it inasmuch as it is not open to a party to approbate and reprobate The family settlement was duly acted upon by the parties and Shrimati Laeti Devi filed suits whenever necessary on that basis The family settlement was not obtained under undue influence and without independent advice He further alleged that the properties covered by the family settlement being ancestral he had an interest in them by birth and so long as that document was not set aside in his presence, it remained binding The plaintiff could not go behind the same

With a view to bring out with sufficient clarity the controversy in this appeal it would be useful to refer to certain other undisputed facts

On the death of Lala Chiranji Lal proceedings for mutation of names were taken in respect of the pro

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perties alleged to be left by Lala Chiranji Lal in Mauza Sankar Dware Mohal Har Prasad and Mohal Dhane Ram and in Mauza Lahar Patti Lahar Mohal Gau Khwalindagan, Tehsil Fatehabad Shrimati Lareti Devi claimed that she was entitled to get her name recorded in respect of the said properties There were various other claimants but it is not necessary to give details with regard to such other claimants The Assistant Collector 1st class came to the conclusion that none of the claimants before him had been able to prove his or her exclusive possession over the share left by Lala Chiranji Lal deceased Considering the prayer for mutation on the basis of title, the Assistant Collector came to the conclusion that it was Shrimati Lareti Devi, who was entitled to get her name recorded He accordingly made an order to that effect and directed other objectors including B Sukhbasi Lal to seek their remedy from the civil court The claim of Ramesh Chandra, the plaintiff in the instant suit was also rejected as he was found not entitled to mutation of his name in the presence of his mother The above proceeding was followed up by institution of Suit No 15 of 1932 in the court of Subordinate Judge Agra by B Sukhbasi Lal against Shrimati Lareti Devi The said suit was filed on the 1st March 1932 and the sole plaintiff in that suit was B Sukhbasi Lal and the sole defendant was Musammat Lareti Devi In that suit, B Sukhbasi Lal alleged in the plaint that on the death of Lala Chiranji Lal on 21st January, 1929 a dispute arose between him and the defendant, namely Musammat Lareti Devi regarding the family properties That dispute was resolved by means of a compromise by way of family settlement on the 3rd and registered on the 15th March, 1929 Some properties and some money was given to the defendant Shrimati Lareti Devi and that the plaintiff remained the owner of the remaining properties including the Zamindari properties in

Mauza Lahar Patti, Pargana Fatehabad and Mauza Mau, Pargana Agra, district Agra It was further alleged in the plaint that though Musammat Lareti Devi admitted the said family settlement in the revenue court but by mistake the name of the defendant was continued to be entered in the Khewat in respect of the properties detailed in the plaint The family settlement dated 3rd March 1929 was binding on Shrimati Lareti Devi and the plaintiff was entitled to obtain possession over the property involved in the suit The cause of action for that suit arose on 3rd March, 1929 when the family settlement was made and on the 17th August 1931 when the order for mutation of name was passed in favour of Musammat Lareti Devi The relief sought in the suit was that the plaintiff be awarded possession over the property situate in Mauza Lahar Patti Lahar Pargana Fatehabad and Mauza Mau, Pargana Agra, district Agra

That suit was contested by Shrimati Lareti Devi who filed a written statement on 25th April, 1932 With regard to the family settlement she alleged that the same had been obtained by undue influence She was unaware of its consequences due to ignorance of law and for want of legal advice She, however, asserted that the document was certainly binding on B Sukhbasi Lal and his son The reply of Shrimati Lareti Devi on this part of the case was ambiguous On the application filed by B Sukhbasi Lal in that case, Shrimati Lareti Devi was directed to plead her case more clearly Shrimati Lareti Devi, however, insisted in her reply and said that although the family settlement was not binding on her and her son, it did bind B Sukhbasi Lal and his son B Sukhbasi Lal filed another application on 27th May, 1932, describing how Musammat Lareti Devi did not clearly state her case in respect of the family settlement relied upon by B Sukhbasi Lal, and further stating that if the defendant herself repudiated the

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settlement deed and said that for reasons mentioned in the written statement it was not binding on her, his submission was that he and his minor son were not bound by it. A somewhat peculiar prayer was made in that application which is quoted below:

> The plaintiff prays that in case of clear unequivocal denial of the family settlement by the defendant, the court be pleased to order that the family settlement is revoked by consent of the parties—it would bind none and no party shall have any right to fall back on it. The plaintiff be then allowed to amend his plaint and the suit shall be decided on the basis of that amendment."

The court concerned passed the following order on the same date, namely, 27th May 1932:

> The defendant lady says that the family settlement was obtained by undue influence and hence is not binding on her but is yet binding on the plaintiff and his son.
>
> The plaintiff says in these circumstances he and his son too are not bound by the settlement. The parties thereof stand clear of any settlement whatsoever and they are in the legal position as if no settlement were ever made."

On the 14th June 1932, B. Sukhbasi Lal applied for the amendment of his plaint. The material paragraphs of that application for amendment, are reproduced below:

> 1. Para no. 4 of the plaint may be struck off and para no. 4, as given below may be substituted in its place—
>
> "The defendant acted contrary to the family settlement dated 3rd/15th March, 1929 and refuses to be bound thereby in spite of several

opportunities being given to her Hence (as held by this Court on the 27th May, 1932), the plaintiff is entitled to overlook the said document and rely on his actual rights as a surviving member of the joint family The plaintiff submits that the plaintiff and Lala Chiranjilal deceased were always the members of a joint family If on account of any proceeding which may have been taken through some policy legal separation be inferred, it never meant separation, nor it actually took place, nor was it acted upon, nor was it maintained On the other hand at the time of the death of Lala Chiranjilal, he (Lala Chiranjilal) and the plaintiff were the members of a joint family '

2 A new para no 5 as given below may be added—

' On the death of Lala Chiranjilal the plaintiff was the owner in possession of the entire family property according to Hindu Law governed by Mitakshara Law and he remained the exclusive owner in possession after his death But on account of the family settlement dated 3rd/15th March, 1929 the plaintiff is entitled under the circumstances of the case to get back from the defendant the property specified below in reliefs (*c*) and (*d*) sought to be possessed and Rs 10,000 which were given to the defendant and the property specified below in reliefs (*a*) and (*b*) sought to be possessed against which the name of the defendant was by mistake entered by the revenue court "

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3 A new para no 6 as given below may be added—

'The defendant has no right to have possession over the property specified below at the foot of the plaint She was repeatedly asked to give possession and return Rs 10,000 which was given to her towards the consideration of the family settlement but she at the instigation of the adversaries of the plaintiff, does not pay any heed to it'

4 Para no 7 as given below may be substituted in place of para no 5—

"The cause of action for this suit arose on 21st January, 1929, the day of death of Chiranjilal, the 17th August 1931, the date on which mutation of names was improperly effected, the 27th May, 1932, the day on which the order was passed by the court and particularly on the 30th May, 1932 when final refusal was made, within the local limits of the jurisdiction of this court"

5 Para no 8 as given below may be substituted in place of para no 6—

'For purposes of jurisdiction of the court the subject matter of the suit is valued at Rs 50,000 and for payment of court fee at Rs 10,000, the cash amount at Rs 10,000 the value of the property and at Rs 6,882 1-0 five times the Government revenue'

6 The following relief may be substituted in place of relief (a) of the plaint—

"(a) The plaintiff may on dispossession of the defendant be awarded proprietary possession over the property situate in Mauza Lahar

Patti Lahar, Thana Shankardwari, Pargana Fatehabad, district Agra, and the property situate in Rawatpara, Agra, specified below A decree for Rs 10,000 in cash may be passed against the defendant

The list of the properties given in the plaint was also amended by adding other properties, namely, house no 5122 with six shops situate in Rawatpara, Agra, Zamindari property, situate in Mauza Thana Shankardwara, Pargana Fatehabad, the entire property in Mohal Har Prasad comprising of 759 bighas and 4 biswas and a moiety share in the property in Mohal Dhani Ram, comprising of 115 bighas and 17 biswas land The effect of the amendment of the plaint put shortly was that the claim on the basis of the family settlement was given up and title was set up by B Sukhbasi Lal to the entire estate of Lala Chiranji Lal on the basis of survivorship By the amendment, B Sukhbasi Lal claimed those properties also that had been allotted to Shrimati Lareti Devi under the family settlement and also prayed for recovery of Rs 10,000 which was said to have been paid to Shrimati Lareti Devi by way of consideration of the aforesaid family settlement That suit was decided by the trial court on the 10th November, 1934 and the decree of the trial court was confirmed by the Hon ble High Court on 10th February, 1944 The concurrent finding given by both the courts is that Lala Chiranji Lal and B Sukhbasi Lal were not members of joint Hindu family but were separate from each other Suit of B Sukhbasi Lal for recovery of immovable property was dismissed but a conditional decree for recovery of Rs 10,000 was passed in favour of B Sukhbasi Lal subject to the condition that B Sukhbasi Lal would restore to Shrimati Lareti Devi property in his possession in pursuance of the

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settlement The instant suit was filed after the decision of Suit No 15 of 1932 by the trial court but before the decision of the appeal in that case by the Hon ble High Court In the present suit, Ramesh Chandra plaintiff, as stated above, has claimed those items of immovable properties which were allotted to B Sukhbasi Lal under the family settlement This Court while disposing of the first appeal in suit no 15 of 1932 made the following observations

> Learned counsel for the appellant suggested that his client would at any rate be entitled to a share in these properties standing in the name of Chiranji Lal because they were the properties of the firm of which Sukhbasi Lal and Chiranji Lal were members even if it was not established that the two brothers formed a joint Hindu family He also gave us to understand that a suit for possession of the property in the possession of Sukhbasi Lal had already been instituted by the son of Musammat Lareti Devi who is now dead

And at another place, it was observed

> 'That being so, we are not in a position to go into the merits of the dispute about the property in the possession of B Sukhbasi Lal

It may relevantly be mentioned at this place that another suit being suit no 48 of 1946 was filed by B Sukhbasi Lal for recovery of the properties on the basis that the same had been acquired jointly by him and Lala Chiranji Lal That suit was dismissed by the trial court on 28th February, 1956 and the first appeal against the decision of the trial court was dismissed by this Court on 13th January, 1966

Ram Babu the son of B Sukhbasi Lal filed another suit on 4th January 1947, being suit no 8 of 1947 on

the basis that there was separation between L. Chiranji Lal and B. Sukhbasi Lal and that L. Chiranji Lal had made the will in his (Ram Babu's favour)

On the pleadings in the instant case, court below framed the following issues

(1) Whether the property in suit belongs to Chiranji Lal deceased as alleged by the plaintiff?

(2) Whether the family settlement of 3rd March, 1929, is not binding upon the plaintiff for the reasons alleged?

(3) Whether Chiranji Lal deceased executed a valid will about the property in suit and other property? If so, its effect upon the plaintiff's suit?

(4) Whether the suit is barred by time?

(5) Whether the suit or defence is barred by principles of *res judicata*?

(6) Whether the suit is barred by principles of estoppel?

(7) Whether Musammat Mahadevi defendant no 1 acquired title to the property in suit by adverse possession?

(8) Whether the plaintiff is entitled to mesne profits, if so, how much?

(9) Whether the plaintiff is not entitled to file this suit without getting the family settlement cancelled?

(10) Whether the plaintiff is not entitled to possession without payment to the defendants, the amounts mentioned in para 16 B of the written statement?

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From a perusal of the pleadings in this case, it is clear that the case of both Ram Babu and Shrimati Maha Devi, who were made defendants as legal representatives of B Sukhbasi Lal is that Chiranji Lal was member of the joint family with B Sukhbasi Lal at the time of his death, and the entire property standing in his name as well as in the name of B Sukhbasi Lal was joint family property and passed on to B Sukhbasi Lal by survivorship, secondly, that Chiranji Lal was a member of the joint family till 1911 and the property acquired till then even in the name of Chiranji Lal, was joint family property and on severance of status in 1911, B Sukhbasi Lal became owner of a half share in the property, and thirdly, that the four items of property in suit were acquired out of joint fund of B Sukhbasi Lal and L. Chiranji Lal from their joint business, and therefore they had half share each

On issue no 1 court below came to the conclusion that the property in suit belonged to Lala Chiranji Lal as alleged by the plaintiff On issue no 2, the view taken by the lower court is that the family settlement was not an unconscionable act of the plaintiff's mother on the other hand it was a prudent act, and that the plaintiff was bound by the settlement effected by Shrimati Laeti, his mother Issue no 3 was answered against defendant Ram Babu and it was held that no such will of Lala Chiranji Lal as alleged by Ram Babu, had been proved in this case On issue no 4, the court below came to the conclusion that the plaintiff's suit was barred by Art 91 of the Indian Limitation Act, as the suit had not been brought within three years from the date when the facts entitling the plaintiff to get the family settlement set aside, came to his knowledge On issue no 5, the court below held that the claim of the plaintiff was in no way barred by *res judicata* Likewise, on issue no 6, it was held that the suit was not

barred by principles of estoppel The finding on issue no 7 is that Shrimati Lareti Devi defendant no 1 did not acquire right to the property in suit by adverse possession On issue no 8, the court below held that the plaintiff was not entitled to mesne profit The view taken by the court below relating to issue no 9 was that the plaintiff was not entitled to file the suit without getting the family settlement cancelled On issue no 10, it was held that in case a decree could be passed in favour of the plaintiff it would have been necessary to impose the condition of return of Rs 10,000 by the plaintiff to the defendant

On the above findings, the court below dismissed the plaintiff's suit and directed the parties to bear their own costs

In support of the appeal, Sri *Jagdish Swarup*, the learned counsel for the appellant has urged that in view of the decision in the previous suit namely, suit no 15 of 1932, it was no more open to B Sukhbasi Lal to raise the defence that Lala Chiranji Lal was member of joint Hindu family with him at the time of his death and further that it was not open to B Sukhbasi Lal to rely on the family settlement for the purpose of defeating the plaintiff's claim The learned counsel contended that if such defence was not open to B Sukhbasi Lal who was the sole defendant in this case, then on his death Ram Baboo his son or Shrimati Maha Devi, his widow, who were brought on the record as his legal representatives, could not raise such defence According to him, the only defence that could be raised by legal representatives of a deceased defendant would be the defence that could have been raised by the deceased himself If the legal representative had any right, interest or title to the property in suit independently of the deceased, then that right title or interest could

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be canvassed by a separate suit. The learned counsel for the appellant also urged that the view of law taken by the court below that the plaintiff's suit was time barred under Art. 91 of the Indian Limitation Act, is erroneous. It has also been urged that on merits also, the evidence and materials on the record clearly establish that Lala Chiranji Lal at the time of his death, was not a member of the joint Hindu family of B. Sukhbasi Lal. The properties in suit were exclusive property of Lala Chiranji Lal, which devolved on his daughter Shrimati Lareti Devi on his death. As a result of the death of Shrimati Lareti Devi, the plaintiff her only son, succeeded to the estate of Chiranji Lal as reversioner.

The learned counsel on behalf of the respondents has urged that the finding of the court below on the question of limitation was correct, that the evidence on the record clearly established that Lala Chiranji Lal died as a member of the joint Hindu family, of which B. Sukhbasi Lal was the other member, that the properties in suit were joint family ancestral properties and on the death of Lala Chiranji Lal, B. Sukhbasi Lal became the owner of the entire property by survivorship, that it is not correct that B. Sukhbasi Lal had cancelled revoked or given a go by to the family settlement as alleged on behalf of the plaintiff, and that any previous contract by B. Sukhbasi Lal during the course of the earlier suit, could not be said to create the bar of estoppel. It was also urged that Ram Baboo was not a party to suit no. 15 of 1932, nor was the suit filed by B. Sukhbasi Lal in a representative capacity. The decision in the previous suit, therefore, could not create the bar of *res judicata* against the defence raised in the present suit by B. Sukhbasi Lal deceased or by Ram Babo and Shrimati Maha Devi. It is the correctness

of these submissions that we have now to decide in this case

On the question of limitation, the court below took the view that the family settlement referred to above, could not be deemed to have been cancelled or revoked by the acts of the parties or any order of the court in suit no 15 of 1932 It further took the view that it was necessary for the plaintiff to seek the relief of cancellation of the family settlement before he could proceed to sue for the recovery of property which had been allotted to B Sukhbasi Lal under the family settlement Such suit for cancellation should have been filed within three years from the date of the plaintiff's knowledge of facts, which entitled him to seek the cancellation of the family settlement The plaintiff having failed to do so, the present suit which according to the court below, must be deemed to be for the cancellation of the family settlement also by implication, is time barred under Art 91 of the Indian Limitation Act Our view is that the court below went wrong in taking the view that it did, on the question of limitation The present suit is a suit for recovery of possession of immovable property by a reversioner on the death of the limited owner The question that, therefore, arises is whether in such a suit, it is necessary for the reversioner plaintiff to seek the setting aside or cancellation of any transaction which could defeat his right to the property The law on the subject has been stated in Mulla's Hindu Law (13th Edition, paras 205 and 209 at pages 235 and 237, respectively), which read as hereunder

> '205 *Declaratory suit in cases of unauthorised alienations*—(1) Where a widow or other limited heir alienates property inherited by her in contravention of provisions of para 178, the next reversioner though he has no interest higher than a

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chance of succession, may institute a suit in her life time for a declaration that the alienation is not binding on the reversion and if the facts are proved, the Court may pass a decree declaring that the alienation is not valid beyond the life time of the limited heir (vide paras 175 and 202)

(2) The reversioners however are not bound to institute a declaratory suit They are not obliged to take any action in the life time of the limited heir They may wait until the estate vests in them on her death, and then sue the alienee for possession of the property

and para 209 reads as hereunder

'209 *Reversioner's suit for possession and limitation*—A suit by reversioners, entitled to succeed to the estate on the death of a widow or other limited heir, for possession of immovable property from an alienee from her must be brought within twelve years from her death (the Indian Limitation Act, 1908, Schedule I, Art 141) and of movable property within six years from that date"

A similar question arose before the Privy Council in the case of *Bijoy Gopal Mukerji* v *Krishna Mahishi Debi* (1) The relevant observation made by the Privy Council in that case is as follows

'A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death But she may alienate it subject to certain conditions being complied with Her alienation is not, therefore, absolutely void, but it is *prima*

(1) 11 R 34 Cal 329

facie voidable at the election of the reversionary heir He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir It is true that the appellants prayed by their plaint a declaration that the *ijara* was inoperative as against them, as leading up to their prayer for delivery to them of *khas* possession But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on, for showing that the *ijara* or any derivative dealings with the property were not in fact voidable but were binding on the reversionary heirs '

On such observations their Lordships took the view that the article in the schedule to the Limitation Act applicable to that case was Art 141 and the suit was, therefore, not barred In the case of *Obala Kondama Natcker Ayyan* v *Kandasamy Gounder* (1) the principle of law laid down in *Bijoy Gopal Mukerji* v *Krishna Mahishi Debi* (2) by the Privy Council referred to above was relied upon The Bombay High Court in the case of *Hanamgowda Shidgowda Patil* v *Irgowda Shivgowda Patil* (3) observed

> It may be taken as established, and there is ample authority for the proposition, that in the case of reversioner, it is not essential for him to set aside any alienation by the widow but that he

(1) A I R 1921 P C 66 (2) 11 I R 84 Cal 820
(3) A I R 1925 Bom 9

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could sue to enforce his right as a reversioner without setting aside the alienation within the period prescribed by the Indian Limitation Act after the death of the widow."

Reference was made to various cases including the case of *Bejoy Gopal Mukerji* v *Krishna Mahishi Debi* (1)

We are, therefore, of the view that the plaintiff's suit was not barred by Art 91 of the Indian Limitation Act Shrimati Laren Devi died on 27th April, 1940 when reversion opened and cause of action to sue for possession accrued to the plaintiff The suit was filed in January 1941

The next question which needs consideration is whether it was open to B Sukhbasi Lal to raise the defence that Lala Chiranji Lal died as a member of the joint Hindu family and that B Sukhbasi Lal came to be the owner of the entire properties by survivorship on L Chiranji Lal's death or to raise the defence that was raised on the basis of the family settlement As stated earlier, suit no 15 of 1932 was filed by B Sukh basi Lal as the sole plaintiff against Shrimati Laraiti Devi, the mother of the present plaintiff as the sole defendant The first issue that was framed in that suit was whether Lala Chiranji Lal was joint with the plain tiff when he died The finding returned on that issue is in the following words

> "On the evidence as a whole, I am of opinion that the plaintiff has failed to prove that he was joint with Chiranji Lal at the time when the latter died and the defendant has established that the two were separate from each other"

It may here be noted that during the pendency of that litigation Shrimati Laraiti died on 27th April 1940 and Ramesh Chander, who is the plaintiff in the instant

(1) I L R 34 Cal 329

suit, was brought on record in her place We have already noted that when the instant suit was filed, the appeal against the decision of the trial court in suit no 15 of 1932 was still pending in this Court That first appeal being First Appeal no 466 of 1935 was decided by this Court on the 10th February, 1944 The Bench hearing that appeal considered the evidence produced by the parties in that case and ultimately came to the conclusion that the evidence in the case pointed to the separation of B Sukhbasi Lal from Lala Chiranji Lal and it could not possibly be said that the learned Judge who decided that suit, was wrong in the conclusion which he reached upon that question of fact There is, therefore, no manner of doubt that the question now raised was a direct question in the earlier suit, and that the answer to that question was given against B Sukh basi Lal This being so there is no escape from the conclusion that the plea of jointness raised by B Sukh basi Lal in the instant case is barred by *res judicata*

With regard to the plea of B Sukhbasi Lal on the basis of the family settlement, we have already made reference to the developments that had taken place during the trial of suit no 15 of 1932 It is true that initially B Sukhbasi Lal had filed suit no 15 of 1932 on the basis of the aforesaid family settlement it is also true that Shrimati Laraiti Devi in that suit took the stand that the family settlement was not binding on her or her son but that it was binding on B Sukhbasi Lal and his son, it is true that in spite of the order of the Court, she did not further clarify her contentions about the family settlement, and it is also true that as a result of the attitude adopted by Shrimati Laraiti Devi B Sukhbasi Lal proceeded to get the plaint amended and to base his claim to the entire estate of Chiranji Lal on the basis of survivorship and gave up reliance on the family settlement By getting his plaint amended, B-

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Sukhbasi Lal not only gave up reliance on the family settlement but also claimed a decree for the refund of the sum of Rs 10,000 which was paid to Shrimati Laraiti Devi under that family settlement Further the relief for recovery of property was extended in respect of those properties also which were given to Shrimati Laraiti Devi The fact remains that for one reason or the other B Sukhbasi Lal gave up reliance on the family settlement in respect of his claim to the property in dispute In spite of the stand taken by Shrimati Laraiti Devi in respect of the family settlement, it was open to B Sukhbasi Lal to stick to the position that he had taken in the suit, and to insist on his right on the basis of the family settlement also The claim on the basis of the family settlement was a claim which might and ought to have been raised or pursued in the previous suit This being so, the defence on the basis of the family settlement now put forth in the instant suit by B Sukhbasi Lal is a claim which is barred by constructive *res judicata* under s 11, explanation 4, C P C There was no legal compulsion on B Sukhbasi Lal for giving up that claim in the earlier suit All that could be said is that he was provoked into taking that position in view of the attitude of Shrimati Laraiti Devi in that case Nonetheless, the giving up of that claim was voluntary on the part of B Sukhbasi Lal

If the aforesaid pleas could not be raised by B Sukhbasi Lal himself, the next question that arises is whether those pleas could be raised by the present respondents who were brought on the record as the legal representatives of B Sukhbasi Lal It is not disputed that the present respondents Shrimati Maha Devi and Ram Baboo were brought on the record as legal representatives of B Sukhbasi Lal under O XXII, r 4, C P C Further, it has not been shown to us that, when, an application to bring the present respondent,

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on the record as legal representatives was made, on behalf of the plaintiff, in the instant case, any objection against that prayer was made on behalf of the proposed legal representatives The present respondents, therefore, agreed to be brought on record as the legal representatives of B Sukhbasi Lal The question, therefore, is whether the defence on the basis of existence of joint family and on the basis of family settlement, which could not have been raised by B Sukhbasi Lal himself in this suit as defendant, could be raised by his legal representatives when brought on record

The learned counsel for the appellant in support of his contention has invited our attention to s 146 of the Code of Civil Procedure S 146 reads as follows —

> ' Save as otherwise provided by this Code or by any law for the time being in force, where any proceedings may be taken or application made by or against any person then the proceedings may be taken or the application may be made by or against any person claiming under him "

The relevant paragraph of O XXII, r 4, is cl (2) and runs as follows —

> ' Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant "

An argument has been made on behalf of the respondents that there is a conflict in the two provisions quoted above, and that the provision of s 146 must override the provision of O XXII 1 4, C P C On that basis, it has been urged that the right available under any law for the time being in force, is saved from the rule of law contained in that section The law for the time being in force, is said to be the Hindu Law There after, it has been assumed that the principles of Hindu

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placed reliance on the case of *Moti Bala Devi* v *Satya nand Tirtha Swami* (1) We are of the view that the contention made on behalf of the appellants that the respondents Shrimati Maha Devi and Ram Baboo having come on the record as legal representatives of B Sukh basi Lal are precluded from raising the defence which could not be raised by B Sukhbasi Lal himself is correct It is obvious that legal representatives cannot have a right in excess of the right of the deceased whose legal representatives they are If such pleas by B Sukhbasi Lal were barred by *res judicata* his legal representatives namely, the present respondents could not ignore that bar, and reagitate the said question Of course it was very much open to B Sukhbasi Lal to plead that the decision in suit no 15 of 1932 or any other order of the court in that case did not create the bar of *res judicata* against the defence that B Sukhbasi Lal took in the instant case It was open to the legal representatives of B Sukhbasi Lal also to do that We have, however, already come to the conclusion that B Sukhbasi Lal himself could not raise the plea in question in this suit by way of defence on account of what had happened in suit no 15 of 1932

Learned counsel for the respondents has placed reliance on the case of *Shrimati Saila Bala Dasi* v *Sri mati Nirmala Sundari Dassi* (2) The decision in that case does not lay down any proposition which might be relevant to the question whether it is open to the legal representative of a deceased party to raise question which the deceased could not have raised The only question that was considered by the Supreme Court in that case was whether a transferee of the property in respect of which a decree had been passed could be permitted to join the appeal pending from that decree in the appel late stage It was held that the transfer having been made during the pendency of the suit and no application

(1) 1930 A I I 886 (2) A I R 1968 S C 894

for joining the litigation by the transferee under O XXII r 10, C P C having been made, he could not be impleaded as an appellant in the appeal from the decision of the trial court Their Lordships proceeded further to observe that although O XXII r 10 C P C did not apply to such a case s 146, C P C was wide enough to cover the case On that basis, it was held that the transferee could be joined as an appellant in the appeal itself under s 146 C P C This proposition by itself cannot be used as an argument for contending that not only could the transferee be impleaded in appeal as an appellant but that he could also take up the case which could not be taken up by his transferor who was party to the suit In fact the Supreme Court held that the transferee could file an appeal by virtue of s 146 C P C provided the transferor had a right of appeal This observation is indicative of the principle that the transferee could not do more than what the transferor himself could do

Then reliance was placed on the Single Judge decision of this Court in the case of *Kalka Singh* v *Indradeo Singh* (1) The learned Single Judge found that the objection that was raised by the outgoing party was wide enough to include the contention that was sought to be raised by the incoming party In view of the aforesaid finding the question which is under consideration by us in this appeal could not arise in that case By way of an *obiter*, it was observed by the learned Single Judge that the prohibition under O XXII r 4(2) C P C is not prohibition against raising question of legality which go to the very root of the matter and are in the nature of questions of jurisdiction but the prohibition operated in regard to the substantive rights of the parties In the case in hand there is no question regarding jurisdiction and for that reason also we cannot make use

(1) A I R 1957 All 781

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Chandra *alias* Jiwa Ram the minor the second party

According to the learned counsel for the appellant Ram Baboo who was a minor could not be deemed to have been a party to the family settlement inspite of the description given therein As a minor he could not enter into a binding contract nor could he effect the transfer of any property The proposition that a family settlement is not a transfer is now too well settled The question whether Ram Baboo as a minor could be a transferor or a transferee therefore, does not arise The learned counsel for the respondents has urged that the transaction evidenced by the family settlement cannot be treated to be a contract either We however find it difficult to accept that submission A family settlement is nothing but a compromise of doubtful and disputed claims As soon as it is a compromise it cannot be urged with any force that it is not a contract A compromise must be the result of the consensus of opinions of conflicting parties with undertakings by both sides In the case of *Partap Singh* v *Sant Kaur* (1) the Privy Council dealt with a similar deed of settlement on the basis that it was a contract The learned counsel for the appellant has referred to s 11 of the Indian Contract Act in order to point out that a person who is not of the age of majority according to the law to which he is subject is not competent to contract It has been urged that by reason of minority Ram Baboo, therefore cannot be deemed to be a party to the family settlement We find force in the submissions on behalf of the appellant It must therefore be held that it was open to B Sukhbasi Lal to file suit no 15 of 1952 in his own name and the decision in that suit would bind his son Ram Baboo also although he was not made a party to that cause

(1) A I R 1938 P C 151

explicitly On the question whether Ram Baboo can be deemed to have been a party to the previous suit or not, it would be relevant to mention that one of the pleas raised by Shrimati Laram Devi in her written statement in that suit was that the suit was bad for non joinder of Ram Baboo Inspite of that plea being there B Sukhbasi Lal did not implead Ram Baboo as a plaintiff

On behalf of the respondents, reliance has been placed on a number of decisions to show that it is open to a minor, whose guardian *ad litem* was grossly negligent to show that the decree passed is not binding on him It is not necessary for us to deal with all the cases that have been cited on the point at length One of the cases so cited is the case of *Smt Siraj Fatma* v *Mahmood Ali* (1, In that case it was held that a minor has a substantive right to avoid a decree passed against him in a case where his guardian *ad litem* was guilty of negligence We have absolutely no doubt in our minds that a minor has such right The question that remains to be answered is whether such right is available to a minor coparcener who was not a party to the suit which resulted in a decree contrary to his interest We have no hesitation in coming to the conclusion that the rule of law laid down in the last mentioned case cannot be extended to a case where the minor was not a party to the case and where the guardian was not appointed as guardian *ad litem* by the court The code of conduct of a *karta* of the family or a Hindu father governed by Mitakshera school of Hindu Law, is a matter which rests upon the principles of Hindu Law The conduct of a person who has been appointed guardian *ad litem* of minor party, in certain matters has to be regulated

(1) A I R 1948 All 293

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by the court itself As soon as a person is appointed guardian *ad litem* he comes to owe a duty of diligence to the court In case, he is found to be negligent and his conduct transpires to be contrary to the interest of the ward the court will intervene and relieve the ward from the consequences flowing therefrom It is on account of the failure of the guardian *ad litem* to fulfil that duty that a minor who is a party to the cause gets a substantive right to avoid the decree on the ground of negligence of his guardian *ad litem* Whether a Hindu father or a *karta* of Joint Hindu family is acting prudently in entering in a transaction is not a concern of the court The question whether a particular dealing is prudent or not rests entirely in the unfettered discretion of a Hindu father or a *karta* of a Hindu joint family If, however, an act is done and it is then challenged as being imprudent, the court gets the jurisdiction to enquire into that matter and to give a decision which might result in setting the transaction at naught

Another submission made on behalf of the appellant is that the family settlement was not binding and enforceable against the present plaintiff We have already mentioned that Shrimati Laraiti Devi was a party to the family settlement for self and as guardian of the present plaintiff who was a minor on that date The action of Laraiti Devi could be binding on the present plaintiff on only two grounds If Shrimati Laraiti Devi could act as the guardian of the plaintiff and if otherwise the transaction was free from any failings, the present plaintiff would be bound by that action of Shrimati Laraiti Devi The transaction would also be binding on the present plaintiff as reversioner as one entered into by the limited owner, provided it was a prudent act and was one for the benefit of the estate It is not in dispute that Sri Raja Ram, the

father of the plaintiff is alive. The person who could act as the natural guardian of the plaintiff was, therefore, Raja Ram and not Shrimati Laraiti Devi. The action of Shrimati Laraiti Devi purporting to be in her position as natural guardian of the plaintiff, therefore, cannot have any effect on the rights of the present plaintiff. With regard to the question whether the family settlement is binding on the plaintiff on account of its being an act of the limited owner capable of affecting the right of the reversioner, it has been contended on behalf of the appellant that Shrimati Laraiti Devi in entering into the family settlement was attempting to bargain with the reversioner's right. The recital in the family settlement relating to the present question is as follows —

> The second party (Shrimati Laraiti Devi and Ram Baboo) shall become the owners of the property detailed below, which is valued at Rs 50,000 and the first party Babu Sukhbasi Lal, shall become the owner of the entire remaining property movable and immovable, documents, decrees of the Revenue and Civil Courts, houses, property, etc that stand in the name of Lala Chiranji Lal deceased.'

In entering into such a transaction, Shrimati Laraiti Devi was trying to convert her limited right into absolute right at the cost of the reversioner's right. It may be that it was open to Shrimati Laraiti Devi to enter into a family settlement with a view to avoid litigation and to secure family peace. What is doubtful is whether in doing so it was open to Shrimati Laraiti Devi to enhance her personal right by getting her limited ownership converted into absolute ownership. By becoming absolute owner of the part of the property that was given to her under the family settlement, she was diverting succession from the reversioner to her own

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heir On such consideration, we have come to the conclusion that the family settlement cannot be deemed to be binding on the present plaintiff and it cannot, therefore defeat the plaintiff's claim It was further urged that the reversionary right could not be the subject matter of the contract which formed the basis of the family settlement

On this part of the case the learned counsel for the appellant has placed reliance on the decision of the Privy Council in the case of *Amrit Narayan Singh* v *Gaya Singh* (1) The appeal before the Privy Council arose out of a suit for recovery of possession of certain properties that originally belonged to plaintiff's maternal grandfather Jhamman Singh The defendant respondents in that case were alleged to have wrongly possessed themselves of the properties under colour of certain arbitration proceedings while the estate was held by his mother Kar Koer as a limited owner under the Hindu Law Kar Koer died in 1905 and the suit was filed in 1908 The question that arose in that case was whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents of that case possession of those properties were binding on the appellant When Kar Koer applied for her name being recorded in the revenue records the agnates of Jhamman Singh raised a contest as to her right to hold property The dispute was referred to arbitration Kar Koer was represented by her husband Rajendra Singh before the arbitrators The materials in that case did not show that Rajendra Singh had any authority to act on behalf of his wife as her agent Before the arbitrator could decide the controversy, a compromise was arrived at and in that compromise also, Rajendra Singh purported to act both for his wife as well as her minor son, the appellant in that case In the compromise it was disclosed that Kar Koer abandoned, in favour of the agnates all rights

(1) A I R 1917 P C 95

to the immovable property of her father, receiving on her part, besides some movable property two small fractional shares in certain lands which stood in her and in her mother's name The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate An award was given on the basis of that compromise It was also observed that it had not been established that the proceedings before the arbitrators ever came to knowledge of Kar Koer or that she knew of the compromise and its effects Application for making the award a rule of the Court was made by the agnates The Court of first instance held that all the proceedings in connection with the compromise and the award had been without Kar Koer's knowledge Application of the agnates was, therefore, dismissed On an appeal before the District Judge the decision of the court of first instance was reversed and a decree on the basis of the award was passed The learned District Judge passed the order on the basis that Kar Koer through her husband Rajendra Singh was aware of the arbitration proceedings A special appeal preferred from the decision of the District Judge to the High Court at Calcutta, but that was dismissed The result of the decision was that she was put out of possession of the properties covered by the compromise Their Lordships of the Privy Council found that neither in the judgment of the District Judge nor that of the High Court was there any reference to the right of Kar Koer's infant's son or to the effect of the compromise which culminated in the award on his reversionary interest One of the pleas advanced on behalf of the appellant was that the arbitration proceedings and the compromise and the award were fradulent and taken and entered into without the knowledge or authority of Kar Koer, and that in any event, he was not bound by them The defendants on the other hand urged that the award

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and the decree precluded the plaintiff from maintaining the action In appeal from the said action in the High Court, the question that was agitated was one relating to the binding effect of the award and the decree on the rights of the infant reversioner The High Court reversed the decree of the Subordinate Judge and dismissed the plaintiff s suit The following observation was made by the Privy Council —

> Their Lordships are unable to concur in the propositions on which the learned Judges of the High Court have based their judgment With respect, in proceeding to consider whether Rajender Singh, the plaintiff s father had power to refer the matter on behalf of his minor son to arbitration they seem to have misconceived the legal position of the infant under the Hindu law Evidently they thought he had a right which could form the subject of bargain This is an obvious mistake, a Hindu reversioner has no right or interest in *praesenti* in the property which the female owner holds for her life Until it vests in him on her death should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs His right becomes concrete only on her demise until then it is mere *spes successionis* His guardian, if he happens to be a minor cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto Rajender s action, therefore, in referring to arbitration any matter connected with his son s reversionary interest was null and void "

A further observation made in another part of the judgment may be usefully quoted and is as follows —

> Even had the minor an existing right, the father would have no power to enter into an

arrangement which wiped out all his interest without any consideration for the little property that was left to Kar Koer was taken by her under the compromise and not by virtue of her right to her father's estate It is difficult to see how the learned Judges came to the conclusion that the compromise was to the benefit of the minor

Reliance was also placed on the case of *Annada Mohan Roy* v *Gour Mohan Mullick* (1) In that case the plaintiff had agreements under which he purported to purchase expectations under the will of an uncle or alternatively rights as nephews expectant upon the termination of the surviving widows right in the property of the uncle After considering the provision of Transfer of Property Act prohibiting the transfer of *spes successione* their Lordships took the view that it was impossible for their Lordships to admit the common sense of maintaining an enactment which would prevent the purpose of the contract while permitting the contract to stand as a contract or to see how by appealing to s 65 of the Indian Contract Act or to the nature of the bargain as a mere bargain *de futuro*, they could uphold it as a contract when it is a contract as to which, not only must specific performance be refused under the Transfer of Property Act, but as to which damages can never be recovered, because the contract is not a performable contract until the realisation of the expectation occurs We have therefore come to the conclusion that the reversionary right of the plaintiff was not affected by the family settlement

Having already held that the respondents as legal representatives of B Sukhbasi Lal in this case are precluded from raising the plea of the existence of a joint

(1) A I R 1923 P C 189

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family it is not necessary for us to examine the evidence on the subject but all the same our attention having been invited to it we will now proceed to decide whether Lala Chiranji Lal died separate or as a member of the joint family along with B. Sukhbasi Lal.

The trial court in suit no. 15 of 1932 examined the entire evidence that was produced in that case and which has also been produced in the instant case and it came to the conclusion that B. Sukhbasi Lal and L. Chiranji Lal had separated from each other. In appeal from the said decision, this Court for its own satisfaction examined the entire evidence and confirmed the finding returned by the court below. While deciding the first appeal this Court observed that it was an admitted fact in that case that L. Sukhbasi Lal who was a legal practitioner and L. Chiranji Lal continued to carry on joint business but their Lordships went on to say that that circumstance might suggest that they had decided to continue as members of the joint Hindu family after the separation of Chhaddami Lal's branch but that it was by no means conclusive on the point. After making that observation the court examined the documentary evidence one by one, and came to the conclusion that the aforesaid two persons had separated. The evidence that was produced in that case has also been produced in the present case and reliance has been placed on that evidence for, once more, urging in this case that B. Sukhbasi Lal and L. Chiranji Lal had continued to be joint. In the earlier case reference was made to the power of attorney, dated August 26, 1910 executed by B. Sukhbasi Lal in favour of L. Chiranji Lal and Baboo Lal. The view taken was that such a power of attorney could not have been executed if Lala Chiranji Lal had been a member of a joint Hindu

family The court came to the conclusion that the natural inference was that there was a disruption in the family in the year 1904 or thereabout but that the business continued to be carried on jointly towards the end of 1910 or 1911 In a suit instituted by Lala Chiranji Lal, the contention made by Baboo Lal of the branch of Chhidammi Lal was that the entire family was joint in April 1911 A dispute therefore, arose which was ultimately settled by the deed of relinquishment in August 1911 This Court further found that there was nothing to suggest that Lala Chiranji Lal and B Sukhbasi Lal had effected a re union in 1911 or any time thereafter In that appeal this Court considered the proceeding in the revenue court for partition of village Lahar as affording a strong piece of evidence of separation The proceedings for partition in the revenue court were originally intended to be a partition by mates and bound between the members of Chhedammi Lal s family on the one hand and B Sukhbasi Lal and L Chiranji Lal on the other, but Lala Chiranji Lal made an application on Febru ary 24, 1918 that a separate Mohal be formed for him This clearly went to show that by means of that appli cation Lala Chiranji Lal wanted his property to be separated by mates and bound from the property of Lala Sukhbasi Lal A copy of the application of Lala Chiranji Lal in partition case no 8 of 1912 of the Court of Partition Officer decided on 18th March, 1929 has also been filed in the present case and has been marked Ex 166 It has been clearly stated in the said application that Lala Chiranji Lal non applicant for partition wanted his Mohal to be formed separately A prayer to that effect was actually made A copy of another objection filed by Lala Chiranji Lal in the same case has been marked Ex 144 in this case In the first paragraph of that petition it was said that

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at the time of the partition, the kind of land be taken into consideration In para 2 of the said application, it was stated that the *khudkasht* land of more than 12 years standing was in the exclusive possession of the objector and that as a matter of fact it was the objector who had been cultivating the same though it was fictitiously entered in the name of all the co sharers The said *khudkasht* land was liable to be put exclusively in the objector's share in the Mohal of non applicants for partition

Likewise Ex 265 is a copy of objection filed by Baboo Sukhbasi Lal in the revenue court One of the paragraphs in the said objection is as follows —

> There are two groves numbers (??) in the village these were planted by the objector alone and are in his possession these shall be given to the objector alone

With regard to the *khudkasht* land it was said by B Sukhbasi Lal that that be put in the exclusive share of the objector in the Mohal of the non applicants

In view of the finding arrived at by the trial court in suit no 15 of 1932 as well as those arrived at by this Court in appeal from that suit and further in view of the evidence and materials in this case we do not find any reason to differ from the finding returned by the trial court in this suit We are therefore satisfied that Lala Chiranji Lal died not as a member of the Joint Hindu family with B Sukhbasi Lal On the materials in this case, the only conclusion at which one can arrive is that there was no jointness between B Sukhbasi Lal and L Chiranji Lal or reunion between them at the time of death of L Chiranji Lal The court below has very correctly analysed the documentary and oral evidence in this case and the finding arrived at by it is not liable to be set aside

So far as the claim of the mesne profit is concerned we are of the opinion that it is not a fit case in which a decree for past mesne profits could be passed. The parties and their predecessors have been changing positions from time to time about the legal effect of the family settlement. The effect of family settlement has never been finally adjudicated upon so far. The plaintiff however is entitled to mesne profits from the date of the decree of this Court up to the date when he obtains possession over the property in suit. In the absence of sufficient materials it is not possible for this Court to fix the rate of mesne profits and this therefore will have to be done by the execution court.

The only other question that remains to be considered is whether the plaintiff is liable to pay the sum of Rs 11 000 alleged to have been paid by B. Sukhbasi Lal towards the price of Rawatpara property or to pay the sum of Rs 21 000 alleged to have been paid by B. Sukhbasi Lal to the branch of Chhidammulal and to pay the sum of Rs 20 000 alleged to have been spent on repair of Rawatpara property by B. Sukhbasi Lal and lastly to pay the sum of Rs 10,000 which was paid to Shrimati Laraiti Devi plaintiff's mother under the family settlement. So far as the sums of Rs 11 000 Rs 21 000 and Rs 20 000 are concerned court below arrived at the conclusion that these sums were not payable by the plaintiff as a condition precedent to his obtaining possession over the suit properties. With regard to the sum of Rs 10 000 the observation made by the court below is that this amount was liable to be returned by Shrimati Laraiti Devi before she could recover possession of the property, over which B. Sukhbasi Lal was in possession but as the suit was dismissed by the court below there could be no order as to the payment of the sum of Rs 10 000 by the

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plaintiff to the defendants The sum of Rs 21,000 paid to the branch of Chhidammilal according to the case of B Sukhbasi Lal itself, the payment of this amount was the liability of both L Chiranjilal and B Sukhbasi Lal It was admitted by B Sukhbasi Lal during the course of the proceedings in suit no 15 of 1932 that this sum was paid out of joint funds The materials also indicate that the sum of Rs 11,000 was also paid out of joint funds Court below was, therefore justified in coming to the conclusion that this amount must also have been accounted for in the partnership account With regard to the sum of Rs 20 000 alleged to have been spent on repairs of Rawatpara property, court below has considered the materials on the record and has come to the conclusion that this amount also could have been spent from the joint fund and adjusted in the accounts Nothing has been shown to us to establish that the conclusion arrived at by the court below with regard to the above three items of money is not correct We, therefore, agree with the conclusions arrived at by the court below in relation to the aforesaid three items of money With regard to the last item of Rs 10,000 paid under the family settlement we do not find it possible to make the payment of that amount by the plaintiff as a condition precedent to his obtaining possession over the suit properties We have already held that the family settlement is not binding on the plaintiff Consequently, the plaintiff cannot be held liable to pay the sum of Rs 10,000 No other point has been urged before us

The appeal is allowed judgment and decree of the court below are set aside and plaintiff's suit is decreed for possession over the properties specified in Schedule A given at the foot of the plaint Plaintiffs' claim for a decree for past and *pendente lite* mesne profit is

dismissed The plaintiff shall however, recover mesne profit at the rate to be fixed by the execution court from the date of the decree of this Court up to the date when plaintiff gets possession over the said properties The plaintiff shall get costs of this Court from the defendant respondents So far as the costs of the Court below are concerned, under the circumstances of the case we direct that the same will be borne by the parties themselves

Appeal allowed

APPELLATE CIVIL

*Before Mr Justice G D Sahgal and Mr Justice Lakshmi Prasad**

1967 May

DISTRICT MAGISTRATE UNNAO AND OTHERS — APPELLANTS,

v

PARAS NATH SHUKLA — RESPONDENT

U P Panchayat Raj Act, 1947 *ss* 2(ss) 9(1)(g) *and* 96 A—*Delegation of its power by State Government under s* 95(1)(g) *to Sub Divisional Officer—Additional Sub Divisional Officer not included by virtue of s* 2(ss)—*Order under s* 95(1)(g) *by Additional Sub Divisional Officer is nullity—Order does not attain any higher status even when confirmed in appeal*

Notification no 4483 P/XXXIII—50 57 *dated* 19*th December* 1958

By notification no 4483 P/XXXIII—50 57 dated 19th December 1958 the State Government in exercise of its powers under s 96A delegated its power to take action under cl (g) of subs (1) of s 95 of the Act to the Sub Divisional Officer subject to appeal before the District Magistrate

Held Additional Sub Divisional Officer is not included by virtue of s 2(ss) of the Act and order passed by him under s 95(1)(g) is nullity

An order passed without jurisdiction is a mere nullity and it does not attain any higher status simply because an appeal is preferred from it and it is confirmed in appeal It may be that the appellate Court in disposing of an appeal has the same powers which the trial court possesses in respect of a matter It may also be that the pendency of an appeal is tantamount to the pendency of original proceedings in an appellate Court

Case law discussed

Special Appeal no 167 of 1966 against the judgment and decree, dated March 31, 1966, passed by B N NIGAM J in Writ Petition no 454 of 1964

The facts appear in the judgment

K S Verma, for the Appellant

Hargur Charan Srivastava for the Respondent

*While sitting at Lucknow

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The following judgment of the Court was delivered by—

L PRASAD, J —This is an opposite parties special appeal from the order of a learned Single Judge by which the respondent's petition under Art 226 of the Constitution for the issue of a writ of *certiorari* has been allowed

The respondent petitioner was a Pradhan On certain complaints made against him the Additional Sub Divisional Officer proceeded to inquire into the charges and on finding that the charges were proved, passed an order of dismissal The respondent petitioner then went in appeal which came to be dismissed There after he approached this Court by a petition under Art 226 of the Constitution praying for the quashing of the order of dismissal passed by the Additional Sub Divisional Officer and confirmed in appeal by the District Magistrate Unnao

The main ground on which the respondent petitioner challenged the impugned orders was that the Additional Sub Divisional Officer had no jurisdiction to deal with the matter and as such the order passed by him was a mere nullity and remained so despite its confirmation in appeal That the impugned order of dismissal came to be passed under cl (*g*) of sub s (1) of s 95 of the U P Panchayat Raj Act is not in controversy Under that provision power is given to the State Government to take action Then we have s 96 A of the Act to say that the State Government may delegate all or any of its powers under the Act to any officer or authority subordinate to it subject to such conditions and restrictions as it may deem fit to impose By notification no 4483 P/XXXIII—50 57, dated 19th December 1958 published in Part III of the *Uttar Pradesh Gazette*, dated 27th December 1958, the State

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Government in exercise of the powers conferred on it under s. 96 A of the Act delegated its power to take action under cl. (g) of sub-s. (1) of s. 95 of the Act to the Sub Divisional Officer subject to the condition that an order of removal passed by the Sub-Divisional Officer shall be subject to appeal before the District Magistrate within thirty days from the date of such order. The contention of the respondent petitioner which has been upheld by the learned Single Judge was that by virtue of the abovementioned delegation the Additional Sub Divisional Officer did not get authority to deal with the matter, notwithstanding the definition of the expression Sub Divisional Officer as given in s. 2(*ss*) of the Act. The said definition says that a Sub Divisional Officer includes an Additional Sub Divisional Officer designated or appointed as such by the appropriate authority.

We have heard learned counsel for the parties. The learned counsel for the appellants has raised exactly the same points he raised before the learned Single Judge. His first contention is that having regard to the definition of the term Sub Divisional Officer in the Act itself, the delegation made in favour of the Sub Divisional Officer under the notification referred to above must be taken to enure in favour of an Additional Sub Divisional Officer also. We are unable to accept the contention. Exactly similar arguments appear to have been raised in *Gaya Dutt* v. *S D O II, Maharajganj* (1) decided by a Division Bench of this Court and the same were rejected. That case was with reference to r. 25 of the Panchayat Raj Rules, which requires that a petition challenging an election is to be presented before The Sub Divisional Officer. Relying on the phraseology of r. 25 the Division Bench held that it was not possible to hold that the person

(1) 1964 A.L.J. 148

presenting an election petition could choose to present it either before the Sub Divisional Officer or before an Additional Sub Divisional Officer The view taken in that case is that since the law directs the presentation of an election petition to the Sub Divisional Officer, i e the officer who is in charge of the sub division it has got to be presented to that officer and to no other officer even though it may be that the expression Sub Divisional Officer as defined in the Act includes an Additional Sub Divisional Officer also If we may say so with due respect to the Hon ble Judges, who decided that case, we are in complete agreement with the reasoning advanced by them On principle the present case stands on exactly the same footing, because here also the delegation under the notification referred to above is made in favour of the Sub Divisional Officer i e the officer in charge of a Sub Division and not to any other officer who may have by virtue of his appointment as an Additional Sub Divisional Officer all or any of the powers of the Sub Divisional Officer We therefore, repel the contention and see no reason to differ from the view expressed by the learned Single Judge on that point

The other contention raised by the learned counsel is that even if the order of dismissal was defective, the defect stood cured the moment it was confirmed in appeal which was undoubtedly decided by an authority competent to decide it This point has been dealt with at some length by the learned Single Judge and in support of the view taken by him he has referred to the cases of *Collector of Customs, Madras* v *A H A Rahiman* (1) and *State of U P* v *Mohd Nooh* (2) We find that the observations reproduced from the aforesaid Supreme Court case in the judgment of the learned Single Judge fully cover the point raised in the present case It is clearly laid down by the Sup

(1) A I R 1957 Mad 498 (2) A I R 1958 S C 86

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reme Court in that case that to quash an order passed by a Subordinate Tribunal without jurisdiction a writ has to issue whether that order has been confirmed in appeal or whether no appeal has been preferred against it The position appears to be that an order passed without jurisdiction is a mere nullity and it does not attain any higher status simply because an appeal is preferred from it and it is confirmed in appeal It may be that the appellate court in disposing of an appeal has the same powers which the trial court possesses in respect of a matter It may also be that the pendency of an appeal is tantamount to the pendency of original proceedings in an appellate court None of these propositions appear to help the contention that an order, though a mere nullity, becomes a valid and effective order because of its confirmation in appeal We accordingly see no substance in the other contention raised by the learned counsel and repel the same

It was faintly urged that the respondent petitioner should not have been allowed relief because he does not appear to have challenged the jurisdiction of the Additional Sub Divisional Officer in dealing with the matter either before him or in appeal It does not appear from the judgment under appeal if this contention was raised before the learned Single Judge However be that as it may the fact remains that the contention is not quite correct in so far as we find from the memorandum of appeal, Annexure 2, that in its paras 4 and 5 the point which is the basis for the petition giving rise to this appeal has been raised therein We accordingly refuse to accept the contention that the respondent petitioner is not entitled to relief because of his failure to raise the point before the subordinate tribunal

No other point has been urged before us The special appeal is accordingly dismissed with costs

Appeal dismissed

APPELLATE CIVIL

*Before Mr Justice G D Sahgal and Mr Justice I Prasad**

1966
March 22

SHYAM LAL (PLAINTIFF APPELLANT)

v

STATE OF UTTAR PRADESH AND OTHERS
(DEFENDANTS RESPONDENTS)

Contract—*Constructive or Quasi—Obligation under—Doctrine of unjust enrichment —Order for compulsory retirement passed against the plaintiff—Order challenged—Stay order by High Court and subsequently by Supreme Court in an appeal therefrom—Plaintiff received full pay during the operation of stay order—Decision against the plaintiff in both the Courts—Plaintiff must refund the money so received —Obligation under constructive contract—Doctrine of unjust enrichment —Indian Contract Act 1872 s 72—Do not apply*

Interim order—*Result of*

Provident Fund Act, 1925—*s 5(1)—The aforesaid amount cannot be deducted from the Provident Fund of the plaintiff*

Interest—*Cannot be allowed by way of damages for wrongful detention of money*

The plaintiff against whom an order for compulsory retirement was passed continued to receive his pay as a result of the stay order passed by the High Court in a writ petition and subsequently by the Supreme Court in an appeal therefrom is bound on his losing the case to refund the amount so received not under s 72 Indian Contract Act but on the principle of obligation under constructive or implied contract based on the doctrine of unjust enrichment

Contracts implied in law or more properly quasi or constructive contracts are a class of obligations which are imposed or created by law without regard to the assent of the party bound on the ground that they are dictated by reason and justice and which are allowed to be enforced by an action *ex contractu* They rest solely on a legal fiction and are not contract obligations at all in the true sense for there is no agreement but they are

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clothed with the semblance of contract for the purpose of the remedy and the obligation arises not from consent as in the case of true contracts but from the law of natural equity Such contracts rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another and on the principle that whatsoever it is certain that a man ought to do that the law supposes him to have promised to do So when the party to be bound is under a legal obligation to perform the duty from which his promise is inferred the law may infer a promise even as against his intention

(Extract from *Corpus Juris Secundum* Volume 17 1939 Edition under the heading Constructive or Quasi Contracts)

Though there may not be an express contract between the plaintiff and the defendants to refund in the event of his losing the case the amount which was paid by the defendants to the plaintiff as a result of the order of the Court in view of the ultimate decision of the Court the amount became refundable and if the plaintiff is allowed to retain that amount it will amount to allowing him to enrich himself unjustly at the expense of the defendants Therefore on the principle that a man ought to do what the law supposes him to have promised to do the plaintiff must refund the amount on the basis of a constructive implied or quasi contract There is no reason why the statement of law quoted above be not taken to be the state of law in our country also based as it is on the principle of equity and justice S 72 of the Indian Contract Act 1872 do not apply in the present case because the amount was neither paid by mistake nor under coercion but was paid under the orders of the Court

It is well settled that an interim order merges in the final order and does not exist by itself So the result brought about by an interim order would be *non est* in the eye of law if the final order grants no relief The grant of interim relief when the petition was ultimately dismissed could not have the effect of postponing implementation of the order of compulsory retirement

S 8(1) of the Provident Fund Act 1925 gave complete protection during the lifetime of the subscriber against the creditor and also against the Government thus the amount received as salary during the operation of stay order by the plaintiff can not be deducted from his provident fund in spite of the fact of his giving such undertaking before the Supreme Court and embodied in the stay order In the absence of any contract express or implied or any provision of law to justify award of interest interest cannot be allowed by way of damages for wrongful detention of money

Case law discussed

First Civil Appeal No 48 of 1959 against the judgment and decree passed by Harish Chandra Srivastava, Civil Judge, Lucknow in regular suit no 44 of 1957

The facts appear in the judgment

B K Dhaon, Hiredey Behari Lal, Kavta Krishna Kailash Nath and *Akhlesh Sahai*, for the appellant

Standing Counsel for the respondent

The following Judgment of the Court was delivered by—

SAHGAL, J —This is a plaintiff's appeal whose claim for a sum of Rs 31,931 06 has been decreed for a sum of Rs 20,529 06 only and has been dismissed for the rest of the amount But as a counter claim has been decreed against him in favour of the defendants for a sum of Rs 20,529 06, that is the amount for which his suit had been decreed this appeal has been valued at Rs 31,931 06 that is the whole amount for which the original suit was filed There is a cross objection also to the extent of Rs 26 239 54 praying for the setting aside of the decree passed against the defendants respondents to the extent of Rs 20 529 06 and for interest on the amount for which the counter claim was decreed by the trial court amounting to Rs 5,710 48

The plaintiff appellant belonged to the Indian Service of Engineers and was posted in the State of Uttar desh By an order of the President, dated the 17th of April, 1958 he was ordered to be compulsorily retired forthwith On receiving the communication relating to the order of the retirement of the plaintiff the Secretary to the Government of Uttar Pradesh directed the Chief Engineer Irrigation Department under whom the plaintiff appellant was serving to relieve him of his duties immediately and for the communication of the date of relief to the Government and the Accountant General The plaintiff coming to know about it filed a writ peti

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tion in the High Court challenging the order refusing to his compulsory retirement. The writ petition was filed on the 24th of April 1958 and on that very date an interim stay order was issued by the High Court restraining the State of Uttar Pradesh from removing the plaintiff from his post. This stay order was made absolute on the 8th of May 1958. The copy of that order is Ext. 24 at page 71 of the printed paper book. Shri *Kanhaiya Lal Misra*, Advocate General who appeared on behalf of the State of Uttar Pradesh made a statement that the State was willing to pay the plaintiff his salary till the decision of the writ petition but was not prepared to take work from him or to allow him to work as Superintending Engineer the post at which he was working at the time the order of his compulsory retirement was passed. In the circumstances the Court made it clear that the State was not bound to take work from him or to allow him to work as Superintending Engineer during the pendency of the petition but they will pay him the salary month by month as usual till the decision of the writ petition. The writ petition was however, dismissed on the 1st of October 1958. The plaintiff filed an appeal against the dismissal on the 13th of October 1958. On that very day a stay order was obtained from the Supreme Court which was made absolute on the 25th of November, 1958. The order is in following terms—

> On hearing the learned counsel on both sides we make the *ad interim* stay order absolute and direct that the payments made by the Government during the pendency of the appeal in the High Court will continue to be made pending the disposal of this appeal. The petitioner gives his consent that if the appeal is decided against him the money that will be thus paid to him should be deducted from the Provident Fund amount which is due to him.'

(Vide Ext A 3 at pages 11 and 11a of the printed paper book)

In the meantime, however the plaintiff had to be continued to be paid his salary as Superintending Engineer in terms of the interim order of the High Court as well as of the Supreme Court However, the Accountant General would not allow any payment to be made unless the appellant held some post A notification had to be issued creating a temporary post of an Officer on Special Duty attached to the office of the Chief Engineer Irrigation Department to which post the plaintiff was accordingly He accordingly continued to draw pay as an Officer on Special Duty from the 15th of May 1953 to the 28th of February, 1954 After the Supreme Court decided the case and dismissed the appeal, further payment to the plaintiff for the post of the Officer on Special Duty was withheld The plaintiff claims that he remained in service up to the 30th of March, 1954, the date of the dismissal of the appeal by the Supreme Court and as such should be allowed his salary at the rate of Rs 2,150 per mensem from the 1st of March, 1954 to the 30th of March 1954 which comes to a sum of Rs 2,080 The General Provident Fund Account of the plaintiff before the period ending 31st March, 1954 stood at Rs 1,09,623 After the order was passed by the Supreme Court the Government of Uttar Pradesh directed the Accountant General that the order contained in Ext A 8 at page 132 of the printed paper book already referred to above compulsorily retiring the plaintiff was revived and the plaintiff retired from the 15th of May, 1953 the date on which he ceased to work as Superintending Engineer It was accordingly ordered that the amount paid to him thereafter at the rate of Rs 2,150 under orders of the High Court and the Supreme Court be recovered from him The plaintiff was accordingly not paid the whole amount of Rs 1,09,623 which stood

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in his General Provident Fund Account on the 31st of March, 1954 but after deducting a sum of Rs 21,881 06 he was allowed payment of a sum of Rs 87,741 94 Paise only He claimed in his suit the recovery of that amount also In all a suit was filed for a sum of Rs 31 931 06 paise made up of the following item

	Rs
1 Balance of the General Provident Fund of the plaintiff	21 881 06
2 Interest on the Provident Fund of Rs 1 60 620 at the rate of 4 per cent per annum from the 1st April 1954 to the 31st September 1954 (This is to be allowed under the General Provident Fund (Central Services) Rules)	2 192 00
3 Interest on Rs 1 09 628 at the rate of 6 per cent per annum from 1st October 1954 to 15th March 1955	3 011 00
4 Interest on Rs 21 881 06 P at 6 per cent per annum from 16th March 1955 to 26th March 1957 (16th March appears to be the date when the payment of this sum was withheld that is the rest of the amount was paid while 26th March 1955 seems to be the date of the notice under section 80 of the Code of Civil Procedure) Though there is an unexplainable discrepancy between the date given in items no 4 and this date this discrepancy may not be material for the purposes of this case There is also a difference between the parties as to the date when the Provident Fund to the extent of Rs 87 741 94 was paid While the plaintiff's case is that it was paid on the 16th March 1955 that of the defendants is that it was paid on the 26th November 1954 (*vide* paragraph 11 of the plaint and paragraph 11 of the written statement) There is no specific finding of the trial Court on this point as the view that it took did not necessitate any such finding	2 630 60
5 Salary for the period from 1st March 1954 to 30th March 1954	2 080 00
6 Interest on the above sum of Rs 2 080 (the salary due but not paid) at the rate of 6 per cent per annum from 17th April 1955 to 25th March 1957	114 00
Total	31 931 06

The plaintiff claimed that the undertaking given by him before the Supreme Court was invalid and could not be enforced and as such not binding on him He

claimed to have continued in service up to the 30th of March 1954 It is in these circumstances that the suit was filed for the amount already referred to above On the other hand the case of the defendants, that is, the State of Uttar Pradesh the Union of India, the Controller and Auditor General of India and the Accountant General of Uttar Pradesh under whose ultimate orders the payment was withheld, was that the services of the plaintiff were terminated on the 15th of May, 1953 for in view of the dismissal of the writ petition by the High Court and subsequently the appeal by the Supreme Court he must be deemed to have compulsorily retired on that date They also pleaded that as a result of the undertaking by the plaintiff before the Supreme Court they were justified in withholding the payment from the Provident Fund of the amount received by him as pay from the 15th of May 1953 to the 28th of February 1954 In the alternative their claim was that they are in any case entitled to that amount and for that amount they filed a counter claim to the extent of Rs 20,529 06 They claimed interest on this amount to the extent of Rs 5 710 48 the total of the counter claim coming to Rs 26 239 54 P They also claimed that there had been an error in calculating the amount due as General Provident Fund inasmuch as a sum of Rs 1 352 has been wrongly included therein as to which a Statement of Account contained in Ext C 6 was filed Both the parties disputed the claim of each other as to interest also The learned Civil Judge who tried the case held that the orders of the High Court and the Supreme Court are merely interim orders subject to the final result of the litigation in those Courts They did not mean that the plaintiff continued in service during the period till the Supreme Court decided the appeal The result was that after the decision of the writ petition and the dismissal of the appeal the order of retiring the plaintiff compulsorily revived and his services must

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be deemed to have been terminated on the 15th of May 1953. He was therefore not entitled to recover any salary after the 15th of May 1953 and whatever was paid to him thereafter was refundable. He was however of opinion that the amount could not be lawfully deducted from the Provident Fund and on that account he passed a decree for the amount recovered from him from his Provident Fund by deducting salary realized by him for the period from the 15th of May 1953 to the 28th of February 1954. On the other hand he granted a decree in favour of the defendants for that amount. He also held that parties were not entitled to charge any interest there being no stipulation for doing so. He also held that there was an error of a sum of Rs 1,332 in the Provident Fund Account being an excess of interest added in previous years and that it should not be allowed to the plaintiff. The result was that the suit was decreed for a sum of Rs 20,539 06. The defendants however also were granted a counter claim against the plaintiff for a sum of Rs 20,529 06. It is against this decree that this appeal has been filed by the plaintiff and a counter claim by the defendants the claim in appeal having already been referred to above.

The first point to be considered is as to whether the plaintiff appellant should be deemed to have been compulsorily retired from the 15th of May 1953 as claimed by the defendants and held by the trial Court or from the 30th of March, 1954 when the appeal was dismissed by the Supreme Court.

The order of compulsory retirement appears to have been passed by the President sometime on or before the 17th of April, 1953. This would appear from the letter of the Secretary to the Government of Uttar Pradesh dated the 23rd April, 1953 to the Chief Engineer, Irrigation Department under whom the plaintiff was working (*Vide* Ext. A 8). The order was to the

effect that he be relieved of his duties immediately This order may not have been formally communicated to the plaintiff but the fact that he filed a writ petition on the 24th of April, 1953 and prayed for a stay of the operation of the order shows that he had come to know of the order The plaintiff has stated that he received no order of the President of India retiring him compulsorily and says that he was never relieved from Government service till the 30th of March, 1954 on which date on receipt of the news of the dismissal of his appeal by the Supreme Court he sent his charge certificate of relief to the Accountant General of Uttar Pradesh, Allahabad From the statement of Ram Prakash Stenographer to the Chief Engineer Irrigation Department, D W 3, it appears that he entered the letter in the peon book on the 23rd of April 1953 informing the plaintiff that he should hand over charge immediately Nanda Ballabh, D W 4 was the peon who undertook the duty to serve the order He did not find the plaintiff at home and he reported it to Ram Prakash, Stenographer to the Chief Engineer, Irrigation Department D W 3 Ram Prakash asked him to deliver the letter to any member of the plaintiff's family So he again proceeded to the residence of the plaintiff When he knocked at the door the wife and the two sons of the plaintiff came out they took the letter and the peon book inside and after making signature inside the house, plaintiff's wife came out and returned the peon book to him No doubt this witness had seen the plaintiff's wife only once and so he could not recognize her with confidence As to the two sons also he stated that he had not seen them earlier It cannot, therefore, be said from his statement that the service was necessarily made on the wife or the sons of the plaintiff But there can be no doubt that it was made on some lady residing in that house The plaintiff says that he came to know about the order from somebody

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at Delhi that the President of India had passed the order dated the 17th of April, 1953 compulsorily retiring him from service which would come into effect from the date of relief from Government service He filed the writ petition on the 24th of April, 1953 and obtained a stay order against his being removed from his post In the circumstances the conclusion is inevitable that even though the order may not have been served on him personally he did come to know about it and it amounts to the same being served on him

The contention on his behalf however, is that in view of his having obtained a stay order from the High Court and subsequently from the Supreme Court he could not be relieved of his duties and as he could not be so relieved he continued in service

We are unable to agree But for the interim order passed by the High Court the appellant would have been relieved at any rate by 24th April, 1953 the date on which he presented his writ petition It is well settled that an interim order merges in the final order and does not exist by itself So the result brought about by an interim order would be *non est* in the eye of law if the final order grants no relief The grant of interim relief when the petition was ultimately dismissed could not have the effect of postponing implementation of the order of compulsory retirement It must in the circumstances take effect as if there was no interim order

The order was passed on the 17th of April, 1954 It was communicated to the Government of Uttar Pradesh and the Secretary to the Government directed the Chief Engineer to relieve the plaintiff of his duties immediately He could not be relieved because of the stay order that he obtained and when the stay order was vacated he should be deemed to have been relieved on the date on which the order was served on him In the circumstances, he should be deemed to have been relieved on the

24th of April 1953 the date on which he moved the said application for by that time the plaintiff having come to know of the order passed against him must be deemed to have been served The defendants, however are contended if he is deemed to have been compulsorily retired only from the 15th of May 1953 This date is to the advantage of the plaintiff and in these circumstances it must be held that he retired on the 15th of May 1953

On behalf of the plaintiff however, it has been contended that even the orders of the defendants indicate that he was treated as being in service at least up to the 28th of March, 1954 Ext 39 printed at page 111 of the paper book, would show that the payment of his pension had been ordered to commence from the 1st of March 1954 This is a letter addressed to the Treasury Officer sometime in September, 1954 The plaintiff having already received his salary up to the 28th of February, 1954 the order of the payment of pension from the 1st of March, 1954 is understandable He could not be ordered to be paid the pension for the period from the 15th of May, 1953 to the 28th of February, 1954 when he had already received full pay for that period The order as to the payment of pension for that period could be passed only after he had refunded the pay that he had received during the period This document, therefore, cannot be construed as indicating that the Government treated him as being in service till the 28th of February, 1954 Our attention was, however, drawn to document Ext A 11 at pages 134 to 138 of the printed paper book which is a copy of the annual report of Shri Shyam Lal the plaintiff for the period from 1st April 1953 to 31st March 1954 to show that even service papers were maintained relating to him uptil 31st of March, 1954 and as such he must be deemed to be in service We however, find that the remarks of the Chief Engineer about his work are to the

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effect that he did little work for the Department during the period under report as for most of the time he was engrossed in the legal action brought by him against Government against his compulsory retirement. During the period no work was taken from him and he was only allowed to draw his full pay in accordance with the direction of the Court. As he was an Officer on Special Duty, obviously, this document was maintained because formally he was treated still in service but this treatment of his in service was subject to the ultimate result of the petition filed in the High Court and the appeal filed in the Supreme Court. He was treated in service because he had obtained a stay order against the operation of the order of compulsory retirement. When the case itself was ultimately dismissed the stay order as a result of which he continued to be in service automatically stood vacated and the plaintiff reverted to the position as if the stay order had not been passed and the order of compulsory retirement passed against him had become effective.

Attention was then drawn to the orders passed by the High Court (Ext. 30 at page 97 of the printed paper book) on an application on behalf of the State praying for an order directing the plaintiff to refund the salary that was paid to him by the State Government during the pendency of the writ petition, to an application for review and the order passed on that application vide Ext. 31 at page 100 and an order passed in appeal by a Division Bench against the order dismissing the application of the State Government praying for the refund of the salary Ext. A 5 at page 120 of the printed record. It appears from these orders that the application of the State Government praying that the plaintiff be directed to refund the salary that was paid to him by the State Government during pendency of the writ petition was dismissed by CHATURVEDI J. An application for review

also was dismissed but when the appeal came up for hearing before Hon'ble UPADHYA and SRIVASTAVA, JJ it was held that it was not maintainable as no order should have been passed on the application for refund This order seems to have been passed as a result of an agreement between the learned counsel for the parties that the application made to the Court by the State for refund of salary paid to the plaintiff during the pendency of the writ petition was misconceived and did not lie The orders passed on these applications therefore, can not be a bar to the counter claim filed by the defendants in the suit

Shri *B K Dhaon*, the learned counsel for the appellant has relied on a number of authorities shortly to be referred to for the following propositions

(1) If there is an undertaking given to a Court to compensate the defendants in damages, in case the suit was ultimately dismissed the undertaking can be enforced by the Court itself and not by a suit

(2) If an injunction is obtained by a party which is ultimately found to be wrongly obtained not by any mistake of law on the part of the Court but because the Court could not decide at that time whether the position taken by the plaintiff was correct or not, then the damages could be claimed only up to Rs 1,000 through Court even without the establishment of malice on the part of the plaintiff

(3) If a suit is filed for recovery of compensation for the injunction having been wrongly obtained the suit has to be based on malice

This case according to him comes in the first category So far as the period during which the proceedings were pending in the Supreme Court is concerned, an undertaking was given by the plaintiff in the Supreme Court,

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and that undertaking could be enforced with respect to the period it related only by the Supreme Court in those proceedings and not by any other Court in any other proceedings

As to the claim for the period the proceedings were pending in the High Court, according to the argument of Shri *B K Dhaon*, it comes under the third category and to that extent malice must be proved before the suit is decreed In this case, malice is not only not proved, there is no such allegation

The authorities on which reliance has been placed are, *Smith* v *Day* (1), *Imperial Tobaccoo Co* v *Albert Norman* (2), *Rama Row* v *Somasundaram Asary* (3), *Bhupendra Nath Chatterjee* v *Shrimati Tinayani Devi* (4), *Mirza Lal* v *Babu Ram* (5) and *Premji Damodar* v *Govindji & Co* (6) It is not necessary to quote from these authorities exhaustively the passages to which reference was made, but reference may be made to the cases of *Mirza Lal* v *Babu Ram* (5) and *Premji Damodar* v *Govindji & Co* (6)

Referring to the case of *Premji Damodar* v *Govindji & Co* (6) in para 11 the following proposition has been laid down

> The position with regard to action for damages arising out of the institution of civil proceedings stands on a different footing As a general rule it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even though malice is provable or as it is stated in the well known words of BOWEN L J in *(Quartz Mill Gold Mining Co* v *Eyre)* (7)—
>
> the broad canon is true that in the present day and according to our present law the bring

(1) XXI (1889) Ch Division 421 (2) A I R 1928 Cal 1
(3) A I R 1928 Mad 879 (4) A I R 1944 Cal 260
(5) A I R 1944 All 32 (6) A I R 1947 Sind 169
(7) (1885) 11 Q B D 674

ing of an ordinary action however maliciously and however great the want of reasonable and probable cause will not support a subsequent action for malicious prosecution

Again in paragraph 23 it is observed—

Bhupendra Nath v *Mst Tirnayani Devi* (1) at page 296 B K MUKHERJEE, J referring to a similar contention to that put forward by Mr Kimatrai relating to s 95, said

> It may be true as Mr *Das* contends that for the purpose of getting a relief under s 95 Civil P C no malice or want of reasonable and probable cause need be proved but we agree with the view taken by the Madras High Court in *Nanjappa* v *Ganapathe Goundan* (2) that there is no reason for holding that the section in any way interferes with the principles regulating suits for damages for abuse of the processes of the Court The section allows a limited remedy without proof of malice which is open to a party to avail himself of, if he chooses, but if he is not satisfied with this summary remedy and files a suit for compensation in the regular way, he must prove the essential ingredients of a malicious abuse of the Court s process'

In the case of *Mirazi Lal* v *Babu Rao* (3) it is held

> Because the receipt of compensation under s 95, Civil Procedure Code, bars a suit for compensation it does not follow that a suit can be decreed for compensation exceeding the maximum amount mentioned in s 95 In order to succeed it must be proved that there was malice'

(1) A I R 1941 Cal 289 (2) I L R 30 Mad 506
(3) A I R 1944 All 93

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Sangal J.

In our opinion these cases are not applicable to the present case at all. This is not a suit for the enforcement of any undertaking given to the Supreme Court in appeal or to this Court in writ proceedings. The undertaking given by the plaintiff to the Supreme Court was to the effect that if the appeal was decided against him the money that will be paid to him as a result of the order, should be deducted from the Provident Fund amount which is due to him. The defendants do not want to enforce the undertaking. The amount from the Provident Fund has already been deducted by them. The plaintiff filed a suit for its refund. The defendants filed a counter claim not for the purpose of deducting that amount or enforcing the undertaking given to the Supreme Court but because in view of the ultimate order of the Supreme Court, viz. the dismissal of the appeal the amount which they were required to pay as a result of the interim order of the Supreme Court must be refunded to them. Similarly, the claim for the period the writ petition was pending in this Court is based on the ground that the defendants must be paid back the amount they paid during the period on account of the interim order passed in the case by this Court.

It is not at all a case of enforcing an undertaking given to a Court nor is it a case for recovery of compensation for the injunction having been wrongly obtained. It is a suit for refund of an amount which had to be paid to the plaintiff as a result of a temporary relief granted to him in the proceedings but which on account of the proceedings being ultimately dismissed must be deemed to have been wrongly paid to the plaintiff. It was pointed out on behalf of the State that such a claim is based on s. 72 of the Indian Contract Act.

S. 72 of the Indian Contract Act provides—

> 'A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.'

S 72 of the Contract Act apparently does not apply The amount has not been paid by mistake, but it has been paid under the order of the Court which ultimately stands vacated It has not been paid under coercion either

Reliance was placed on behalf of the respondents on the case of *Sales Tax Officer, Banaras* v *Kanhaiya Lal Makund Lal Saraf* (1) wherein it has been laid down as follows

> The respondent was assessed for the said amounts under the U P Sales Tax Act and paid the same but these payments were in respect of forward transactions in silver If the State of U P was not entitled to receive the sales tax on these transactions, the provision in that behalf being *ultra vires*, that could not avail the State and the amounts were paid by the respondent even though they were not due by contract or otherwise The respondent committed the mistake in thinking that the monies paid were due when in fact they were not due and that mistake on being established entitled it to recover the same back from the State under s 72 of the Indian Contract Act It was, however, contended that the payments having been made in discharge of the liability under the U P Sales Tax Act they were payments of tax and even though the terms of s 72 of the Indian Contract Act applies to the facts of the present case no monies paid by way of tax could be recovered We do not see any warrant for this proposition within the terms of s 72 itself

In the same paragraph reference is then made to a decision of the Privy Council in the case of *Shri Satba Prasad Singh* v *Maharaja Srish Chandra Nandi* (2) to the following effect—

(1) A I R 1959 S C 135 (2) A I R 1949 P C 29.

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> The Privy Council decision has set the whole controversy at rest and if it is once established that the payment, even though it be of a tax, has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it'

A perusal of this authority would show that it will not be applicable to the present case In the present case the amount was paid because there was an order of the Court and it was paid under that order which was binding on the defendants It was not a payment made under any mistaken belief S 72 of the Indian Contract Act therefore, did not apply

It can, however not be doubted that a result of the writ petition in this Court and the appeal in the Supreme Court the amount that has been paid to the plaintiff by the defendants for the period beginning May 15, 1953 and ending February 28 1954 was in fact not due to the plaintiff It is thus a case of a quasi contract under which the plaintiff was bound to refund the amount unjustly realized by him The following extracts from *Corpus Juris Secundum*, Volume 17, 1939 Edition under the heading Constructive or Quasi Contracts may make the position clear

> 'Contracts implied in law or, , more properly quasi or constructive contracts are a class of obligations which are imposed or created by law without regard to the ascent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action *ex contractu* They rest solely on a legal fiction and are not contract obligations at all in the true sense, for there is no agreement, but they are

(1) AIR 1949 PC 207

clothed with the sembiance of contract for the purpose of the remedy and the obligation arises not from consent as in the case of true contracts but from the law or natural equity Such contracts rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another and on the principle that whatsoever it is certain that a man ought to do, that the law supposes him to have promised to do So when the party to be bound is under a legal obligation to perform the duty from which his promise is inferred, the Law may infer a promise even as against his intention

It would thus appear that though there may not be an express contract between the plaintiff and the defendants to refund in the event of his losing the case the amount which was paid by the defendants to the plaintiff as a result of the order of the Court, in view of the ultimate decision of the Court the amount became refundable and if the plaintiff is allowed to retain that amount it will amount to allowing him to enrich himself unjustly at the expense of the defendants Therefore, on the principle that a man ought to do what the law supposes him to have promised to do, the plaintiff must refund the amount on the basis of a constructive implied or quasi contract There is no reason why this statement of law in *Corpus Juris Secundum* be not taken to be the state of law in our country also, based as it is on the principles of equity and justice

Shri *B K Dhaon* strenuously relied on the case of *Ram Tahal Singh* v *Biseshwar Lall Sahoo and Soodisht Lall* (1) But that case has no bearing on the present case at all That case was based on the well known doctrine of *Caveat emptor* which principle is applicable to Court sales and it is not necessary to consider that case in detail

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Lastly, there remains the question whether any interest should have been allowed to either party In the absence of any contract expressed or implied or any provision of law to justify the award of interest interest cannot be allowed by way of damages for wrongful detention of money vide *Bengal Nagpur Railway Co Ltd* v *Ruttanji Ramji* (1) followed in *Thawardas Pherumal* v *Union of India* (2) and in *Union of India* v *A L Rallia Ram* (3) Also see *Union of India* v *Watkins Mayor and Co*, (4) and the *Union of India* v *The West Punjab Factories Ltd* (5) No interest therefore, could be awarded to either of the parties Interest for a period of six months from the date of compulsory retirement of the plaintiff is payable under the Provident Fund Rules and it should be allowed at the rate of 4 per cent per annum at which it is payable under those Rules But any interest claimed by the defendants or the plaintiff under any other head cannot be allowed

The claim of the plaintiff for the amount the payment of which had been withheld by the defendants was based on the ground that the undertaking given by him before the Supreme Court was void inasmuch as under the Provident Fund Act no such undertaking could be given This point has been discussed by the learned trial Judge in his finding on issue no 2 and his finding to the effect that s 1 of the Provident Funds Act, 1925 gave complete protection during the lifetime of the subscriber against the creditor and also against the Government has not been challenged The suit was therefore, rightly decreed But the counter claim also has been rightly decreed in view of what has been said above

The defendants though they may be entitled to recover the amounts of pay that they had to give to the plain

(1) A I R 1938 P C 67 (V25) (2) A I R 1960 S C 468
(3) A I R 1963 S C 1926 (4) 1966 S C 975
(5) A I R 1966 S C 393

tiff from the 15th of May, 1953 to the 28th February, 1954 are in any case liable for the pension of the plaintiff for that period The learned counsel for the plaintiff pointed out that his pension has been fixed at an amount of over Rs 800 per mensem He has, however filed no affidavit to that effected so that it could be met by the other side The learned Senior Standing Counsel was not in a position to affirm or deny this assertion We are, therefore, left with no option but to allow deduction of the pension of the plaintiff for this period in accordance with Ext 89 at page 115 at the rate of Rs 525 per mensem The appeal as also the cross objection is accordingly dismissed with this modification that the cross claim of the defendants should stand decreed only for an amount of Rs 20,529 06—Rs 5,013 = Rs 15 516 06 P instead of Rs 20 529 06 In the circumstances of the case parties are ordered to bear their own costs in the appeal as well as the cross objection

Appeal and cross objection dismissed

APPELLATE CRIMINAL

Before Mr Justice Khare and Mr Justice Yashoda Nandan

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August 8

BHAGWAN DIN AND OTHERS (APPELLANTS)

v

STATE (RESPONDENT)

Indian Penal Code, 1860 s 307—*Ingredients of the offence—Causing of hurt by gun—If necessarily raises a presumption of an intention to cause death—Causing of hurt—If material—Facts which the prosecution has to establish*

An offence under s 307 I P C can be made out only when the accused fires the gun at the complainant with the intention to murder him Mere fact that a gun has been used for causing injuries will not necessarily bring the case under s 307 There can be no presumption of intention to cause death be cause firearm was used to cause hurt

The intention however may be established either from the nature of the act committed or from the surrounding circumstances The prosecution has to establish that the nature of injuries were such as was sufficient in the ordinary course of nature to cause death or imminently so dangerous as to cause death and further the intention or knowledge of the accused If the intention is proved the fact that no injury was caused was immaterial

On the facts of the case held that no offence under s 307 was made out

Held, further that there was no apparent conflict between *Hakim Singh* v *State* (1) and *Badshah Singh* v *State* (2)

Case law discussed

Criminal Appeal no 2560 of 1965 connected with Criminal Revision No 1780 of 1965 against the order of TEJ PAL SINGH, Sessions Judge, Banda, dated 22nd October, 1965 in Criminal Sessions Trial No 61 of 1965

P C Chaturvedi, for the Appellants

The following Judgment of the Court was delivered by—

KHARE, J —This is an appeal by Bhagwan Din and nine others, all of whom have been convicted for the offence of rioting and making attempts to commit the

(1) 1965 A L J 969 (2) A I R 1958 All 677

murders of Murlidhar and Phakkar (P Ws 1 and 2) by causing gunshot injuries to them It first came up for hearing before a learned single Judge of this Court, who referred it to a larger Bench Connected with it is Criminal Revision No 1780 of 1965 filed by four of the appellants and their sureties

The occurrence is of 26th February, 1963, and it took place in the village of Bisra within police circle Bisra district Banda Phakkar (P W 2) had, at about 6 a m gone towards Banha Talab to ease himself and Murlidhar (P W 1) had also gone that very side to bring green fodder for his cattle After Phakkar had eased himself and had proceeded in the company of Murlidhar towards Sarju Dube's field the ten appellants, out of whom Ram Kumar was armed with a pistol Shivbali and Ram Kishun were armed with guns and the remaining seven appellants with *lathis*, rushed out from their hiding place Phakkar tried to run away from there Bhagwan Din (appellant) exhorted others by saying *maro* which could either mean 'cause injuries or 'kill The accused persons, who were holding *lathis*, did not go near Phakkar and Murlidhar who were at a distance of only about 18 or 19 paces from them However all the three accused persons who had firearms with them fired their weapons Shivbali and Ram Kishun caused injuries to Phakkar, while Ram Kumar, who was armed with a pistol, was responsible for the injuries which Murlidhar suffered Both the injured raised an alarm which attracted the attention of other villagers who had gone that side to ease themselves and upon their arrival all the assailants made good their escape

The first information report of the occurrence was lodged by Murlidhar (injured) on the same day at 7 a m at police station Bisra which is at a distance of four furlongs from the place of occurrence The motive for the crime, the occurrence as it had taken place and the names

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of the witnesses were mentioned in it Both the injured were sent for their medical examination They were examined by Dr M P Lal (P W 11) on the same day at 3 p m and the doctor found the following injuries on the two injured persons as a result of his examination

Phakkar

(1) Several pellet injuries of the size 1/5" × 1/5" skin deep on the back side of the left thigh in an area of 8" × 5"

(2) Several pellet injuries of the size 1/5" × 1/5" skin deep on the back of the right thigh in an area of 9" × 4½"

Mukhdhar

(1) Several pellet injuries of the size 1/6" × 1/6" skin deep on the back of the right thigh in an area of 12" × 6"

(2) Several pellet injuries of the size 1/6" × 1/6" skin deep on the back of the left thigh in an area of 5" × 3"

In the opinion of the doctor all the injuries were simple and appeared to be about nine hours' old at the time of the examination They could have been caused with a firearm such as a pistol or gun The doctor was further of the opinion that the firearm must have been fired from a distance of about 12 feet or more Since there was some difference in the dimensions of the injuries caused to each of the injured persons the doctor was of the opinion that all the four injuries, two to each of the injured persons, could not be the result of one shot from a firearm The doctor could not be definite whether the injuries received by Phakkar on the back of his two thighs were by a shot from one firearm or by two shots from two firearms The doctor was able to extract two pellets from the back of the left thigh of Phakkar

and also two pellets from the injuries of Murlidhar The doctor was also of the opinion that both the injuries of Murlidhar could have been caused with one shot from one firearm and similarly both the injuries of Phakkar could also be caused by one shot from one firearm

The prosecution relied on the testimony of five eye witnesses of the occurrence They are Murlidhar injured (P W 1) Phakkar injured (P W 2) Kubet Singh (P W 3), Ramlal (P W 4) and Ram Kishun (P W 5) They fully supported the prosecution case Murlidhar also stated about the motive for the crime and said that Ram Autar and Chunbad were beaten in 1962 and on that account a criminal case was started against fourteen persons including Murlidhar and Phakkar In that case Narbada Puswa Ram Kumar Ram Autar and Chunbad (Appellants) were prosecution witnesses The case however ended in acquittal He further stated that four days after that occurrence about which a criminal case had been started the accused Ram Autar and Chunbad and one Dhanpat, the servant of P W Sanglu were beaten on 30th May 1962 and a criminal case was started against Dhanpat Ram Kishun (appellant) Ram Kumar (appellant) Narbada (appellant) and others A case under s 107/117 Cr P C was also started against both the parties Murlidhar and Phakkar and four persons of his party were bound down from one side and Kuiwa Narbada Ram Kishun, Ram Kumar appellants and 12 other persons of the other party were bound down He further stated that sometime in the year 1962 eleven persons including Ram Kumar Bhagwandin Puswa Narbada and Prasad were beaten and a criminal case was started against Murli Phakkar and 17 others

What was stated by Murlidhar and has been mentioned above will clearly show that there was good amount of

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ill feeling between Phakkai and Murlidhar on the one side and Bhagwandin and members of his party on the other side

All the accused persons pleaded not guilty Out of the 10 accused persons six namely Bhagwandin Ram Autar Ram Kishun Ram Kumar Chunbad and Shivbali belong to one and the same family Chunbad and Shivbali are the sons of Bhagwandin while the remaining three accused persons whose names have been mentioned above are his brothers Two more accused persons, namely Puswa and Prasad are their relations while the remaining two namely Narbada and Bishambhar are alleged to be of their party Their defence was that they had been falsely implicated due to enmity They however did not dispute the facts which according to the prosecution case constituted the motive for committing the offence Two witnesses were examined in defence The purpose of the examination of Bhura Singh (D W 1) was to prove certain enmities between Bhagwandin on the one hand and Kuber Singh and Shyam Lal (P Ws) on the other According to Bhura Singh one Ram Ghulb who resided at the house of Kuber Singh (P W) had been convicted for causing injuries to Ram Kumar (appellant) As regards Shyam Lal (P W 4) the statement of Bhura Singh (D W 1) was that Narbada (appellant) along with one Tatu had abducted his sister in law It was also said that he belonged to the party of the complainants One more witness namely Dr S P Jain (D W 2) was examined to prove that Bhagwandin was suffering from tuberculosis when he examined him on 23rd April 1963 The occurrence is of 26th February 1963

The learned Sessions Judge after having considered the entire evidence on the record arrived at the conclusion that the prosecution witnesses were reliable and

Bhagwandin could also be present at the time of the occurrence to exhort other accused persons He therefore convicted the three accused persons who were armed with firearms under ss 148, I P C and 307, I P C He sentenced them to two years rigorous imprisonment for the offence of rioting and to five years rigorous imprisonment for attempting to commit murder an offence punishable under s 307, I P C The remaining appellants were convicted under s 147, I P C and each sentenced to one year s rigorous imprisonment and also under s 307/149, I P C, the sentence awarded to each under that provision of law being three years' rigorous imprisonment All the sentences were ordered to run concurrently

The learned Single Judge before whom this appeal was first listed for disposal noticed that there was some conflict of opinion in two decisions of this Court given by learned single Judges on the point of presumption to be drawn from the use of firearms when the injury caused was not dangerous to life We would discuss the case law after having examined the relevant provisions of the Indian Penal Code

S 307 I P C provides

> Whoever does any act with such intention or knowledge, and under such circumstances that if he by that act caused death he would be guilty of murder shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine and, if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned
>
> When any person offending under this section is under sentence of imprisonment for life he may if hurt is caused be punished with death

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Illustrations

(a) *A* shoots at *Z* with intention to kill him, under such circumstances that if death ensued, *A* would be guilty of murder *A* is liable to punishment under this section

(b) *A* with the intention of causing the death of a child of tender years exposes it in a desert place *A* has committed the offence defined by this section though the death of the child does not ensue

(c) *A* intending to murder *Z*, buys a gun and loads it *A* has not yet committed the offence *A* fires the gun at *Z* He has committed the offence defined in this section and, if by such firing he wounds *Z* he is liable to punishment provided by the latter part of the first paragraph of this section

(d) *A*, intending to murder *Z*, by poison, purchases poison and mixes the same with food which remains in *A*'s keeping *A* has not yet committed the offence in this section *A* places the food on *Z*'s table or delivers it to *Z*'s servants to place it on *Z*'s table *A* has committed the offence defined in this section

It is clear from a perusal of illustration (*c*) that an offence under s 307 I P C, can be made out only when (*i*) the accused fires the gun at the complainant and (*ii*) he has done so with the intention of murdering the complainant It follows that in case any one of these ingredients is lacking the offence under s 307 I P C would not be made out

The same inference can be drawn from a perusal of s 324 I P C which reads as follows

> Whoever except in the case provided for by s 334, voluntarily causes hurt by means of any instrument for shooting stabbing or cutting, or any

instrument which used as a weapon of offence, is likely to cause death or by means of fire or any heated substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale to swallow or to receive into the blood, or by means of any animal shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both"

A person who causes hurt by means of any instrument for shooting can be punished only under s 324 I P C provided the case is covered by all the ingredients of that offence as defined in the section and no other major offence is made out from the facts and circumstances of the case

It is therefore clear that the mere fact that a gun has been used by an accused person for causing injuries to the complainant will not necessarily bring the case under s 307 of the Indian Penal Code There can be no presumption that the accused intended to cause the death of the complainant merely because he used a fire arm to cause him hurt

The intention of the accused person has to be established from either the nature of his act actually committed by him or from other surrounding circumstances Where injury has actually been caused to the victim the prosecution while attempting to establish that the real intention of the accused was to cause an injury of the nature which was sufficient in the ordinary course of nature to cause death or was so imminently dangerous that it could cause death had further to establish the intention or knowledge of the accused as contemplated in s 307 I P C That in effect was the view taken by one of us in the case of *Hakim Singh* v *State* (1) when it was held that mere use of a country made pistol to shoot at a non

(1) 1965 A L J 282

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vital part of the body from a close range will not make out an offence under s 307 I P C In the case of *Badshah Singh* v *State* (1) a learned single Judge of this Court reiterated the law on the subject as follows

> For liability under s 307 the prosecution has to prove the following facts (1) that the accused did an act and (2) that the act was done with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder

The learned Judge further observed that If hurt is caused by such act, the offender becomes liable to transportation for life otherwise the maximum term of imprisonment prescribed is 10 years It would thus appear that the section itself does not take into consideration the effect of the act of the accused as a measure of sentence to be imposed upon him

We respectfully agree with the observations mentioned above It is well established that if the intention or necessary knowledge to cause death was there it is immaterial whether or not any hurt has been caused to the victim and the accused can be held liable for an offence under s 307, I P C even though no hurt was caused

While applying the law to the facts of that case the learned single Judge observed that inasmuch as the injury had been caused on the buttocks from a close range but the firing resulted only in superficial injuries due to defective ammunition the burden to prove that the accused persons knew that the ammunition was defective lay on the accused persons themselves For that proposition he relied on s 106 of the Indian Evidence Act

(1) A I R 1958 All 677

The case of *Badshah Singh* v *State* (1) is therefore clearly distinguishable from the facts of the present case The gun had been fired from a close range causing superficial injuries to the buttocks because the ammunition used proved to be defective Had the ammunition been of the normal standard pellets were bound to penetrate further enter the abdomen and cause serious injuries to peritoneum and intestines It was therefore possible to draw an inference in that case that the intention of the accused persons—unless evidence was given on behalf of the accused persons to show that that was not the intention—was to cause the death of the victim In *Hakim Singh* s case (2) the injuries had been caused from a close range only on non vital parts of the body and therefore no presumption as could be drawn in *Badshah Singh s* case (1) was possible

We are therefore of the opinion that there is no apparent conflict in the two decisions mentioned above Each case has been decided on its own facts and circumstances The facts and circumstances of the two cases mentioned above were different The same inference could not be drawn when the only common factor was the use of firearm

The nature of burden of proof that lies on the prosecution was considered in the case of *Sanju Prasad* v *State of Bihar* (3) It was held by the Supreme Court that where the accused person caused an injury to the complainant with a knife in a vital region but no vital organ was cut the act of the accused person would not by itself be sufficient to take his case out of the purview of s 307 I P C but in order to bring the offence home to the accused the prosecution must establish that his intention or knowledge was of one of the three kinds as mentioned in s 300 I P C It was further held that the state of

(1) A I R 1959 All 671 (2) 1966 A L J 382
(3) A I R 1966 S C 843

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mind of the accused had to be inferred from the surrounding circumstances including motive which would be a relevant circumstance.

From what has been stated above it is abundantly clear that the mere circumstance that a knife had been used as a weapon of attack on vital part of the body (as in *Sanju Prasad's* case (1)) or a firearm was used to cause injuries to the victim (*vide* s. 324 I P C.) would not be sufficient to establish that the accused had committed an offence punishable under s. 307 I P C. Further evidence has to be led by the prosecution to establish the intention of the accused to cause death or his knowledge as envisaged under s. 300 I P C. The burden of proof is on the prosecution and not on the accused.

In all criminal trials for all offences punishable under the Indian Penal Code the burden of proof always lies on the prosecution to bring home the charge to the accused person. It may be that certain circumstances brought out by the defence may make the prosecution case doubtful. Even then that will be a case where the evidence read as a whole will reveal that the prosecution had failed to prove its case against the accused person beyond reasonable doubt.

Now we proceed to discuss the evidence led in the case against the present appellants. As mentioned already the prosecution examined five eye witnesses of the occurrence. Two of them namely Murlidhar and Phakkar (P Ws 1 and 2) had themselves received injuries and their presence at the time of the occurrence could not be doubted. It is true that they were on inimical terms with Bhagwan Din and other appellants. However that circumstance alone will not be sufficient to discredit their testimony. The occurrence had taken place when there was sufficient light. The two persons,

(1) A I R 1965 S C 843

who had been injured must have seen their assailants They were not likely to falsely implicate others and conceal the real offenders The medical evidence supports their testimony inasmuch as (i) the injuries caused to them could have been caused with two or three shots fired from a firearm from a distance of about 18 paces and (ii) the occurrence could have taken place at the time alleged by the prosecution

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When the relations between the two parties are strained it does sometimes happen that the members of the complainant's party include amongst the list of accused persons certain persons who may not have actually taken part in the assault or that they may exaggerate the event The testimony of all the prosecution witnesses has to be carefully scrutinized to make sure whether it can be safely accepted in respect of all the events or against all the accused persons

Kuber Singh (P W 3) Shyam Lal (P W 4) and Ram Kishun (P W 5) are all residents of village Basanda and had gone to ease themselves when they witnessed the occurrence Kuber Singh (P W 3) was returning to his house after having eased himself and was at a distance of 50 to 60 paces from the place of occurrence when the shots were fired All that could be suggested to him during the course of the cross examination was that as he was a resident of Lachhmi Thok as admitted by him it was not necessary for him to go towards the side of Banka Talab where the occurrence took place for the purpose of answering the call of nature That could be no reason for discarding his testimony Shyam Lal (P W 4) had also gone to ease himself towards Banka Talab and was at a distance of 80—85 paces when he witnessed the occurrence All that could be suggested to him during the course of the cross examination was that he was on inimical terms with Narbada (appellant) and it

was for that reason that he was deposing against the appellants. The witness during the course of his cross-examination admitted that his sister in law had been abducted by one Tutti. He however stated that Narbada had nothing to do with that abduction and he was not on intimate terms with Narbada (appellant). This witness too is reliable.

Ram Kishun (P.W. 5) was also returning from the side of Bansi Talab when he saw the occurrence from a distance of 80 paces. He was cross-examined at length but nothing could be brought out to show that he is not a reliable witness.

It has been contended by the learned counsel for the appellants that inasmuch as there were two parties in the village—one that of the complainant and the other of the accused persons—the probability that the witnesses were the sympathisers of the complainant could not be ruled out and therefore their testimony should not be believed. We see no force in this argument. However as there was party feeling in the village the testimony of the prosecution witnesses will have to be received with certain amount of caution.

The testimony of the prosecution witnesses as against the appellants who are said to have been wielding fire arms is sufficiently corroborated by the medical evidence and other circumstances of the case including the motive for the crime. However their testimony on the point that Bhagwandin appellant had instigated other appellants to kill or injure Phakkar and Muhidhar and about the presence of the accused persons who are alleged to be wielding *lathis* is not corroborated by other independent evidence. It is difficult to understand what was the occasion for such exhortation by Bhagwandin. The accused persons who are said to be armed with firearms were at first concealing their presence. They must have

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Khare J.

been there to use their firearms against Phukkar and Muthidhar. Further exhortation was, therefore, hardly necessary. It is significant to note that not a single *lathi* injury was caused to any of the injured persons, although according to the prosecution case itself the assailants were at a distance of only about 18 paces from their victims.

In the circumstances the prosecution case that seven of the accused persons namely Bhagwandin Ram Autar, Nathadu, Bishrambhai Puswa, Prasad and Chunibai, who are alleged to be armed with *lathis*, had taken any part in the assault on Phukkar and Muthidhar is not established beyond reasonable doubt. All the seven appellants named above are therefore entitled to benefit of doubt and acquittal.

The testimony of the prosecution witnesses against Shiva Bali Ram Kumar and Ram Kishan does not suffer from any infirmity and is accepted.

The next point that remains for consideration is what offence if any, was committed by the three appellants namely Shivbali Ram Kumar and Ram Kishan, who were armed with firearms and had fired their guns or pistol at the time of the assault. All that could be established by the prosecution was that all the three appellants named above fired their guns or pistol in the direction of Phukkar and Muthidhar from a close range of about 18 paces at a time when their victims were trying to run away. The injuries caused are on the back part of both the thighs of both the victims namely Muthidhar and Phukkar. In other words all the four injuries were caused on non vital parts of the bodies of the victims. In the circumstances the probability that all the three appellants namely Shivbali Ram Kumar and Ram Kishan, who were armed with fire arms did not intend to cause any injury on any vital part of the bodies of

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Khare J.)

them victims cannot be ruled out They could therefore in the circumstances of the case be convicted only under s 324 read with s 34 I P C It is true that the three appellants namely Shivbali Ram Kumar and Ram Kishun were charged only under s 307 read with s 149 I P C However the facts alleged in the charge are such that they could have been charged alternatively for the offence punishable under s 324 read with s 34 I P C All the three appellants can therefore be convicted and sentenced under s 324 read with s 34 I P C

The appeal of Bhagwandin Ram Autar Nahada Bishambhar Paswa Prasad and Chhabrai is allowed and their conviction and sentence under ss 147 and 307/149 I P C are set aside They are on bail They need not surrender Their bail bonds are discharged The appeal so far as it relates to Shivbali Ram Kumar and Ram Kishun is partly allowed Their conviction and sentences under ss 148 307 and 307/149 I P C are set aside and instead they are convicted under s 324/34 I P C and each sentenced to two years rigorous imprisonment They are on bail They must surrender to their bail forthwith and serve out the sentence as now imposed on them

We now proceed to dispose of the connected revision This offence was committed by Ram Kumar and Ram Kishun during the period for which they had been bound down to keep the peace In default the two appellants named above and their sureties namely Jhamman and Raghubir Singh (the two sureties of Ram Kumar) and Laxmi and Bhauwa (the two sureties of Ram Kishun) had bound themselves to forfeit a sum of Rs 500 each to Government Inasmuch as Ram Kumar and Ram Kishun are proved to have committed an offence under s 324 read with s 34 I P C within the period of one year for which they and their sureties had bound

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LACHMAN DAS v. STATE (Khare J.)

themselves, there is no force in the revision application so far as Ram Kumar, Ram Kishun Jhumman Raghubir Singh Laxmi and Bhuwa are concerned and it is dismissed Natbada and Puswa have been acquitted and therefore they and their sureties, namely Kalua and Shiv Kumar (the sureties of Puswa) and Prahlad and Tej Bahadur Singh (the sureties of Natbada) could not be held liable for any such default and their bonds could not be forfeited The revision application so far as it relates to Natbada Puswa and their sureties Kalua Shiv Kumar Prahlad and Tej Bahadur Singh is allowed and the order forfeiting their bonds is set aside In case any sum has already been recovered from them it shall be refunded

Ordered accordingly

SALES TAX REFERENCE

Before Mr Justice Manchanda and Mr Justice M H Beg

PLASTIC PRODUCTS LTD, KAMLA TOWER KANPUR ... APPLICANT

v

THE COMMISSIONER SALES TAX U P ... OPPOSITE PARTY

1968
January 24

U P Sales Tax Act, (XV of 1948) s 3 (1)—*Notification No 905/X—Whether safety razor falls within the purview of item no 6 of the said notification viz Cosmetics and Toilet requisites*

Safety razor does not fall within the purview of the expression Cosmetics and toilet requisites used in item no 6 of the notification made under s 3 A of the U P Sales Tax Act and is not taxable as such at the higher rate

Sales Tax Miscellaneous Case no 180 of 1961 connected with Sales Tax Miscellaneous Case no 166 of 1961 under s 11 of the U P Sales Tax Act

C S P Singh for the Appellant

MANCHANDA, J —These are cases stated under s 11 of the U P Sales Tax Act (hereafter referred to as the Act) The question referred is

> Whether safety razor as manufactured by the applicant dealer can be classified as cosmetic and toilet within the purview of Notification no 905/X referred to above

The facts lie within a narrow compass The assessee is a manufacturer of safety razors made out of plastic material The relevant year of assessment is 1957-58 The Assessing Officer claimed that such a safety razor fell within the mischief of item no 6 cosmetics and

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THE COMMISSIONER OF SALES TAX U. P. v. Mahendra J

toilet requisites and was therefore, assessible at a higher rate under the said notification issued under s 3 A of the Act The assessee's contention on the other hand was that a safety razor was not a cosmetic nor was it a toilet requisite and therefore it fell to be assessed at the lower rate under the general charging s 3 of the Act The Sales Tax Officer however held safety razors to fall within item no 6 of the aforesaid notification and assessed it at single point accordingly The assessment was confirmed by the Judge (Appeals) and the Judge (Revisions) Hence this reference at the instance of the assessee

The relevant notification was issued under the powers conferred by s 3 A of the Act and it was declared

> that the turnover in respect of the goods specified in the list below shall not with effect from April 1 1956 be liable to tax except—
>
> (a) in case of goods imported from outside Uttar Pradesh at the point of sale by the importer and
>
> (b) in the case of goods manufactured in Uttar Pradesh at the point of sale by the manufacturer

and the Governor is further pleased to declare that such turnover shall with effect from the said date be taxed at the rate of one anna per rupee

Item 6 Cosmetics and toilet requisites

The Hindi version of Item 6 of the Notification is

> 'The list given in this Notification is a very elaborate one and has as many as 47 items ranging from agricultural implements to X ray machines Item no 6 is cosmetics and toilet requisites Item no 35 is sandal wood oil but this was deleted by a notification in 1956 Item no 37 is scents

1966

Dec. 12

In re: The Bombay Sales Tax Act, 1953

and

In re: Messrs. Hindustan Lever Ltd.

Mudholkar J.

and perfumes Item no 18, soap other than washing soap Items nos 17 and 18 have been specifically mentioned notwithstanding that they are included in the dictionary meaning of the words cosmetics and toilet requisites This shows how meticulous and careful the notification was to specify even at the cost of repetition where there was the slightest possibility of such article escaping from the clutches of the notification

There is admittedly no item of razor or safety razor and that is why the department has been pushed into bringing it within item no 6 The question that falls to be considered is whether the article safety razor fairly and squarely falls within the item cosmetics or toilet requisites'? 'Cosmetics is the special word used in item 6 which is followed by the general words "toilet requisites' What do these words mean In Webster's Third New International Dictionary the meaning given of 'cosmetic is 'the art of beautifying the body—a preparation (Except soap) to be applied to the human body for beautifying preserving or altering the appearance of a person or for cleansing colouring conditioning or protecting the skin hair nails lips eyes or teeth' This word in *Corpus Juris Secundum* Vol 20 is given the meaning a general term construed as having reference to hair preparations as well as to skin lotions as including hair oils dyes and dressings tooth pastes washes and dentifrices and toilet soaps defined as meaning any external application intended to beautify or improve the complexion skin or hair"

'Toilet" in Webster's Third New International Dictionary means to make one's toilet, dress groom the process of washing grooming, and

arranging one self for the days activities or for a special occasion The examples of this are given as toilet soap, toiletry etc Toiletry' means "an article or preparation used in making one s toilet (such as a soap lotion, cosmetic, tooth paste, shaving cream cologne) In *Corpus Juris Secundum*, Vol 86 it is mentioned in respect of Toilet that 'other are several different definitions given for the word 'toilet It may mean act or process of dressing, also that which is arranged in dressing attire, dress, get up' also a particular costume and it may designate the several articles collectively used in making one s toilet While formerly the terms referred specially to the act or process of dressing hair, in current use it means a cleansing and grooming of one's person Thus the act of washing and cleansing the hands is a part of making the toilet and the daily shave is generally regarded as a toilet necessity' According to the Shorter Oxford Dictionary 'requisite' means "required by circumstances or the nature of things' Therefore a 'toilet requisite' will be a thing that is required by circumstances or the nature of the thing for purposes of toilet

1965

PEARCE PRODUCTS LTD v THE COMMISSIONER, SALES TAX, U P

Manchanda, J

It is plain that the dictionary meaning of 'toilet' is very wide and toilet requisites cover a large variety of articles ranging from toilet paper, toilet cloth to the requirements of the dressing table and bath room If that is the meaning which has to be given to toilet requisites then a safety razor would conceivably fall within it That however, is not the meaning that has to be given to those words in the contest in which they are used in the notification Such meaning could only have been given if item 6 "toilet requisites" had stood alone but they are

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THE COMMISSIONER SALES TAX U. P.
Manchanda J.

preceded by the specific word cosmetic and therefore the rule of *ejusdem generis* in the construction of statutes will come into play. In any event it is unnecessary to give any conclusive decision on this aspect as we are taking the view that razors complete or incomplete are not toilet requisites within item 6 of the notification. The rule of *ejusdem generis* has been considered in three cases by the Supreme Court. In *Thakur Amar Singhji* v *State of Rajasthan* (1) it was pointed out that the true scope of the rule of *ejusdem generis* is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse that specific words which precede are controlled by the general words which follow. Again in *State of Bombay* v *Ali Gulshan* (2) the Supreme Court issued a warning that 'apart from the fact that the rule of *'ejusdem generis* must be confined within narrow limits and general or comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment it is requisite that there must be a distinct genus which must comprise more than one species before the rule can be applied. Then again in *Smt Lilavati Bai* v *State of Bombay* (3) it was reiterated that it was "the established rule of construction that the Legislature presumed to use the general words in a restricted sense that is to say as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context or the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restrict-

(1) A I R 1955 S C 504 (2) A I R 1966 S C 820
(3) A I R 1957 S C 521

ed meaning to be attached to words of general import it becomes the duty of the courts to give those words their plain and ordinary meaning

Therefore what has to be considered is the scheme of the notification no 905 in selecting certain goods for single point higher taxation The intention was quite clear and that was that the general words which followed the specific word were to be given a restricted meaning Cosmetics was the specific word and this was followed by toilet requisites In the context manufacturers of all toilet requisites were not to be taxed at a higher rate It was only the manufacturer of such toilet requisites as would be of the same genus as cosmetics that were to suffer the higher tax To take some examples to illustrate the point it is manifest that toilet paper, toilet cloth toilet equipment needed for a dressing room or both room would not fall within the mischief of item 6 Nor could it ever have been the intention to include all kinds of articles or artificial aids, which might go to beautify or render the body more beautiful as toilet requisites such necklaces, jewellery hairpins scissors or bangles On the rule of *ejusdem generis* therefore, toilet requisites must be confined to those articles which are of the same genues as cosmetics If that be the true interpretation of the words toilet requisites it is difficult if not impossible to conceive of a safety razor with or without a blade as being of the same genus as cosmetics though it may be a 'toilet requisite within the wider dictionary meaning It only remains to notice the cases cited at the Bar The Supreme Court in *Ramavatar Budhaiprasad* v *The Assistant Sales Tax Officer* (1) held that Pan was not vegetable within the meaning of item 6 of Sch II of the C P and Berar Sales Tax Act, 1947 In *the Deputy Commissioner of Commercial Taxes, Madras Division Madras* v *Ambika Stores* (2)

(1) 12 S T C 286 (2) 14 S T C 688

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Manchanda J

the Madras High Court held that hairpins were not toilet requisites within the meaning of item 51 of the First Schedule to the Madras General Sales Tax Act Again in *V P Somasundara Mudaliar* v *The State of Madras* (1) the Madras High Court held that tooth powder does not come within the scope of item 51 of the First Schedule to the Madras General Sales Tax Act, 1959 because a tooth powder was only used for rubbing and cleaning the teeth and not for beautifying or enhancing the appearance and the cleaning of the teeth should be regarded as an indispensable daily hygiene intended to protect the teeth and preserve them in good condition In *C C Mahajan & Co* v *The State of Bombay* (2) the Bombay High Court held that powder or soap used as depilatory is one which is used for the purpose of cleaning and grooming one's person and as such it is a toilet article In S T Reference No 780 of 1961 a Bench of this Court took the view that Brahmi Amla Hair Oil was both a cosmetic and a toilet requisite and oils other than an edible oil fell within item 6 of the said notification no ST 905/X These cases only show that no hard and fast rule can be laid down and each case has to be decided on its own facts

It was also contended by the assessee, in the alternative, that the article manufactured must be complete in itself for use as a toilet requisite without any outside aid In other words the contention was that, even if a plastic safety razor manufactured could be considered to be a toilet requisite it would not qualify as such for the purpose of the said notification, for the reason that by itself it cannot be used as a toilet requisite and required the insertion of a safety blade before it can be put into use Reliance for this proposition was placed on *Mettur Sandalwood Oil Co* v *The State of Madras* (3) (Sandalwood

(1) 14 S T C 943 (2) 9 S T C 783

(3) 16 S T C 8

oil held not to be a perfume or scent) *Deputy Commissioner of Commercial Taxes* v *Iyanar Coffee and Tea Co, Tuticorin* (1) (French Coffee is not coffee as it requires admixture of chicory powder) and *Pravin Brothers* v *The State of Gujarat* (2) (Cotton Saree when embroidered held not to be a cotton fabric) We can not accede to this contention, for it is not impossible for an article which requires some outside help before it can be put into use to qualify as a toilet requisite if the other conditions are fulfilled The argument of the learned counsel taken to its logical conclusion would lead to an absurdity for even if the razor together with the blade was a toilet requisite it could still not be put into use without the application of soap or powder for the purpose of shaving and, therefore the razor even with the blade would not be a toilet requisite That could never have been the intention In any event it is not necessary to express any concluded opinion on this point as in our view a razor is not a "cosmetic or a "toilet requisite' within the meaning of item 6 of the said Notification

For the reasons given above we would answer the question in favour of the assessee by saying that the razor will be taxable under s 3 of the Act and not at one anna per rupee under s 3 A of the Act The applications are allowed with costs of Rs 100 in each case Counsel's fee is also assessed at Rs 100 in each case

M H BEG, J —While agreeing with all that has fallen from my learned brother MANCHANDA J, in answering the question before us I feel bound to state my reasons for what may look like overlooking what is called the literal rule of interpretation The view has been held in times when statutory law and rules did not constitute anything like the enormous volume which now issues forth from the legislative channels in

(1) 18 S T C 457 (2) 19 S T C 478

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a modern State that the literal or plain meaning rule must be adopted even if absurd results follow [*See*]ERVIS, C J in *Abley* v *Dales* (1)] As Sir C E Odgers points out in Construction of Deeds and Statutes (3rd edition 1912) at page 311 this method of approach was common and important at a time when Statutes were not framed in the wide and general language in which they are couched today Now courts apply the rule less rigidly The practice of today is to enact only the skeleton of the law in the Statutes and the details are left to be filled up by statutory rules and Notifications There are no special rules for interpreting such Notifications apart from general rules of interpretation of statutes and documents which apply The haste in which the increasing number of such Notifications and indeed, many statutes are now drafted, often leaves unintended defects which give rise to difficulties when the question of interpreting them arises In these conditions it is impossible to apply the literal rule very strictly or always At least departure from that rule is no longer so uncommon or considered so shocking as it may have been in the past There must, however be very good and compelling reasons for such a departure And no more deviation from the rule is permissible even today than what is reasonably possible and what the circumstances of the case require imperatively for avoiding absurdity

The Notification which we have to interpret is No 905/IX dated the 31st March 1956 of the U P Government made under s 3A of the U P Sales Act which contains the following entry as item no 6

'Cosmetic and toilet requisites

This Notification also contains 46 other entries of quite a detailed character such as

(1) (1851) 11 C B 378, 391

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Sanitary fittings as item No 36 scents and perfumes as item No 37 'soaps other than washing soaps as item No 38

Our main difficulty in applying the literal rule of interpretation to item No 6 in the above mentioned Notification arises from the fact that the term 'toilet itself has great variety of dictionary meaning In deed there is some difference between the meanings given in the Oxford Dictionary and the larger number of meanings given in the Webster's Third New International Dictionary where among its other meanings we find

> 1 a the act or process of dressing the process of washing grooming and arranging one's self for the days activities or for a special occasion

Among other meanings of the word is a bath room or lavatory fitted with 'a fixture consisting typically of a water flushed bowl with a toilet seat that is used for urinating and defecation We find that the term toilet is used for all kinds of dressing up or cleansing one's self It appears that the word toilet is derived from the French word Toile by which was meant a cloth of various fibres On behalf of the State certain obsolete meanings of the word toilet have been pointed out One of these is the cloth or shawl put over the shoulders during shaving or hair dressing Another archaic meaning cited was the equipment for dressing room including dressing table Even if we confine our attention to the wide meanings of the term toilet' which are current today, it would cover almost every process and means employed for dressing and for making one's self presentable and ready for one's daily activities or for a particular occasion The wide meaning of the term toilet would include a bath room or the lavatory itself, and toilet requisites could, if the wide mean

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ing was taken, include equipment such as wash basins, pipes, water taps, sprays and sanitary fittings This brings us to the next difficulty in interpreting the word toilet requisites as used in the Notification This difficulty is that if the term toilet requisites was used in such a wide sense a number of items in the Notification would become quite redundant and meaningless The Notification read as a whole would then not make sense and appear absurd in parts

In an attempt to find a correct meaning of item No 6 of the above mentioned Notification we looked up the Hindi version of the Notification where we find item no 6 mentioned as follows

"सौन्दर्य वर्धक और सौन्दर्य प्रसाधन सामग्रियां"

This means preparations for enhancing beauty and other aids to beauty The emphasis seems to be on preparations for beautification of the body It was contended on behalf of the assessee that the Hindi version provides the clue to the correct meaning of the terms used It was suggested that the entry No 6 was intended only for preparations which are used up in the actual process of application to the body as aids to beauty or in washing or dressing up one's self or making one's self presentable It is noteworthy that the word toiletry' in the Websters' Third New international Dictionary has been given the following meaning an article or preparation used in making one's toilet (as a soap, lotion, cosmetics, tooth paste, shaving cream, cologne)' If, therefore, the words 'toilet requisites' are to be interpreted in a restricted sense, by applying the *ejusdem generis* rule, we can say that they cover more than cosmetics and would include preparations such as shaving cream tooth paste, hair lotions shampoos, soap although soap is also mentioned separately in the Notification but do not include parts of safety razors or other similar objects In other words "toilet requisites' may be equated with 'toiletry

and could include whatever falls under this heading Tools instruments devices like scissors clippers razors electrical hair dying machines used in the process of hair dressing or shaving or manicure could have been easily indicated clearly or mentioned specifically as other items are mentioned in the Notification if they were intended to be covered by the Notification the effect of which is only that sales tax is levied at a single point instead of being levied at several points We have employed the *ejusdem generis* rule in order to cut down the ambit of the toilet requisites and to confine it to toiletry or toilet preparations which are consumed in the process of application to the body because this seems to be the only way out of the difficulty We have also taken into consideration the fact that the notifying authority has left the item No 6 in the Notification vague and ambiguous and in an unsatisfactory state If there is such a vagueness and ambiguity it has to be resolved in favour of the assessee if that is reasonably possible

It may be mentioned that although we have not applied the literal rule of interpretation in the present case we have applied what is called the Golden Rule of interpretation thus stated by Lord WENSLEYDALE in *Grey* v *Pearson* (1)

> in construing wills and indeed statutes and all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further

The literal rule of interpretation is enough to meet cases of interpretation where no complexities are pre

(1) (1857) 6 H L C 61 at p 106

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sent But in a case where the situation is complicated by features which make it impossible to apply the literal rule reasonably other rules of interpretation which may be applicable have to be used What is known as the Golden Rule generally involves an application of several rules of interpretation in order to get the final result

Question answered

SUPREME COURT

APPELLATE CRIMINAL

1966
September 28

Before Mr Justice Ramaswami Mr Justice Bhargava and Mr Justice Raghubar Dayal

M L SETHI APPELLANT

v

R P KAPUR AND ANOTHER RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Code of Criminal Procedure, *(Act V of)* 1898 s 195(1)(*b*)—*Bar against cognizance of certain offences without a complaint from the Court concerned—Point of time or stage at which applies*

If a private person aggrieved by the information given to the police files a complaint for commission of an offence under s 211 I P C i e false charge of an offence or any other offence of the kind at any stage before a judicial order has been made by a Magistrate there can be no question of the provisions of s 195(1)(*b*) Cr P C being attracted and the necessity therefore of a complaint by any Court because on that date there would be no proceeding in any Court in existence in relation to which the said offence can be said to have been committed The mere fact that on a report being made to the police of a cognizable offence the proceedings must at some later stage end in a judicial order by a Magistrate cannot stand in the way of a private complaint under s 211 being filed and of cognizance being taken of the same by the Court

Criminal Appeal No 110 of 1965 from the Judgment and Order dated the 13th January 1965 of the High Court at Allahabad in Criminal Revision No 1318 of 1964

Frank Anthony, M L Sethi, J C Talwar and *R I Kohli,* for the Appellant

R P Kapur, Respondent No 1 in person

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M. L. SETHI v. R. P. KAPOOR

O. P. Rana for the Respondent No. 2

The following judgment of the Court was delivered by—

BHARGAVA J.—This appeal filed under certificate granted by the High Court at Allahabad is directed against an order passed by that Court dismissing a revision application by which the appellant M. L. Sethi desired the vacation of an order passed by the Sessions Judge of Saharanpur upholding two orders of the Additional District Magistrate (Judicial) Saharanpur dated 6th August 1963 and 9th October 1963. By these orders the Magistrate dismissed two applications presented by the appellant for dismissing a complaint pending before him for commission of offences under ss. 211, 204 and 385 of the Indian Penal Code. A further prayer was made for an order by this Court quashing the proceedings pending in the Court of that Magistrate.

The facts necessary for deciding this appeal may be stated briefly. On 10th December 1958 the appellant lodged a report with the Inspector General of Police, Chandigarh against R. P. Kapur (hereinafter referred to as the respondent) and his mother-in-law charging them with commission of offences punishable under ss. 420, 109, 114 and 120-B, I.P.C. It does not appear to be necessary to give the details of the allegations made in that report. The charge in that First Information Report was based on the allegation that the respondent and his mother-in-law by conspiring together cheated the appellant and his wife of a sum of Rs. 20,000 by persuading the appellant to take a sale deed of some land on certain false representations and on suppression of facts indicating that on the date when the sale deed by the respondent's mother-in-law was executed in favour of the wife of the appellant, the title of the former had

already extinguished as the land had been acquired by the Government under the Land Acquisition Act The offence was registered as a cognizable offence and investigation was started

On 11th April 1959, the respondent filed a complaint in the Court of Judicial Magistrate 1st Class Chandigarh against the appellant for commission of offences under ss 204 211 and 385 I P C In this complaint the respondent alleged that the land was sold by his mother in law to the appellant s wife as a favour to the appellant and that at that time no misrepresentations at all were made in respect of any facts The complaint added that the appellant was fully aware of the land acquisition proceedings but because of fixation of low rate of compensation in the acquisition proceedings the appellant suffered a loss of nearly Rs 13 000 The appellant being a clever criminal lawyer went to the respondent s mother-in law Smt Kaushalya Devi and demanded the sum of Rs 13 000 and when she refused, he threatened her with dire consequences of criminal proceedings against her and her son in law the respondent A similar threat of criminal proceedings was also later given to the respondent himself by the appellant and thereafter the First Information Report was lodged with the Inspector General of Police by the appellant on 10th December 1958 The charge in the complaint further was that the allegations made in the First Information Report by the appellant were false to his knowledge and were contradicted by the appellant s own letters writings and other correspondence It was also stated that the false report to the police was made with the knowledge and intention of putting the respondent in fear of injury to his fair name and reputation in service and otherwise and of being put under arrest and harassment in a criminal trial and thereby to induce

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him to deliver to the appellant Rs 13 000 and submit to other terms that the appellant may choose to impose The last allegation was that the appellant was guilty of the offence under s 204 I P C for secreting five documents which were enumerated in the complaint and this offence was alleged to have been committed, because if these documents had been presented in time the Police would not have entertained the complaint which led to a harassing investigation against the respondent

This complaint filed by the respondent against the appellant as well as the proceedings instituted by the Police on the basis of the First Information Report were transferred under the orders of this Court to the Court of the Additional District Magistrate Saharanpur The case against the respondent and his mother in law based on the First Information Report ended in an order of discharge passed by the High Court of Allahabad on 10th December, 1962, when the charge framed against the respondent and his mother in law by the trying Magistrate was quashed On the record the material available relating to the proceedings based on the F I R dated 10th December 1958 is that it was on 18th July, 1959 for the first time that the respondent was arrested in connection with that report and the Challan by the police for trial of the respondent was presented to the Court on 25th July, 1959 There is no material to show that between 10th December 1958 when the First Information Report was lodged, and 18th July 1959 when the respondent was arrested in connection with it, there was, at any stage any order passed by any Magistrate in connection with the investigation that was going on

As we have mentioned earlier, the revisions before the Sessions Judge, and the High Court, arose out of two orders made by the Additional District Magistrate

on 6th August 1963 and 5th October 1963. The first order was made on an application presented by the appellant on 6th May, 1963 in which he contended that no offence was disclosed on the allegations made in the complaint and on the statement of the complainant recorded by the Magistrate at Chandigarh, and further that in any case the trial was barred on account of want of requisite previous sanction as provided in s 195 of the Code of Criminal Procedure. It was also alleged that the facts were so inter mixed that the trial of any other offence separate from the offence under s 211 I P C was not permissible or possible so that the Magistrate was requested not to proceed with the trial and to withdraw the order summoning the appellant and in the alternative the prayer was that the appellant may be discharged under s 253 Cr P C as the charge against him was groundless.

The second order of the Magistrate dated 5th October 1963 was passed on the application of the appellant dated 12th August 1963, in which it was prayed that the Court may not take cognizance of the complaint as instituted and the trial under s 252 Criminal Procedure Code may not proceed. The prayer was again based on the ground that cognizance of the offence under s 211 I P C could not be taken in view of the provisions of s 195(1) (*a*) and (*b*) Cr P C under which the Court was empowered to proceed in respect of that offence only when there was a complaint in writing by the authority concerned. The Additional District Magistrate by his two orders rejected the contention that s 195 Cr P C barred this particular complaint which had been filed against the appellant. The main ground for these orders was that no proceedings were pending in any Court when the complaint against the appellant was filed in the Court of the Magistrate at

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Chandigarh for the offences under ss. 204, 211 and 385 IPC and consequently s. 195 Cr. P.C. was inapplicable. That is the view of the Addl. District Magistrate which has been upheld both by the Sessions Judge and the High Court and consequently, the appellant has now come up to this Court in this appeal.

On behalf of the appellant the first submission made by his counsel Mr. *Frank Anthony*, was that the making of a report of a cognizable offence with the police is both institution of a criminal proceeding as well as charging a person with having committed an offence so that in this case when the appellant lodged his First Information Report on 10th December 1958 with the Inspector General of Police it must be held that he had instituted a criminal proceeding against the respondent as well as he had charged him with having committed the offences mentioned in that report within the meaning of s. 211 IPC. In support of this proposition learned counsel relied on a Full Bench decision of the Calcutta High Court in *Karim Baksh* v. *The Queen Empress* (1) and a Full Bench decision of the Kerala High Court in *Albert* v. *State of Kerala* (2). It was urged that on this interpretation when the respondent filed a complaint against the appellant under s. 211 IPC together with other offences the provisions of s. 195 Cr. P.C. became attracted. It appears to us that in this case it is not at all necessary to go into the question whether, whenever a complaint of a cognizable offence is filed, it must be held that the complainant is instituting or causing to be instituted a criminal proceeding or is merely charging the person named in the report with having committed the offences mentioned therein because, during the course of argument in the appeal before us, no contention was put forward that no offence

(1) I.L.R. 27 Cal. 874. (2) A.I.R. 1966 Ker. 11.

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under s 211 I P C was made out and that the complaint of the respondent against the appellant was wrongly being treated as in respect of a charge under s 211 upto the stage of the revision before the High Court some attempt was made on behalf of the appellant to plead that the facts alleged by the respondent in his complaint to the Court did not constitute an offence under s 211 I P C committed by the appellants but, in this Court Mr *Frank Anthony* on behalf of the appellant gave up this plea and in fact proceeded to urge before us that the complaint of the respondent against the appellant did specifically include in it a charge under s 211 I P C On behalf of the respondent and the State Government also there was no suggestion that the complaint against the appellant was not in respect of the offence under s 211 I P C It is consequently unnecessary at this stage to go into the question whether the facts given in the complaint, or the facts which may ultimately be found proved after the trial do or do not constitute an offence under s 211 I P C, and if they do whether those facts show that the appellant had instituted a criminal proceeding against the respondent or had only charged him with having committed the offences mentioned in his report That is a point which may have to be decided at the conclusion of the trial of the appellant, and consequently we refrain from going into this question at this stage

The only point that falls for determination by this Court is whether in this case cognizance of the complaint which included an offence under s 211 I P C filed by the respondent against the appellant, was rightly or wrongly taken by the Courts The complaint as we have mentioned earlier was filed by the respondent in the Court of the Judicial Magistrate at Chandigarh on 11th April 1959 and on the same day cognizance of

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the offence was taken by that Magistrate under s 190, Cr P C whereafter that Magistrate proceeded to record the statement of the respondent under s 200, Cr P C Before this cognizance was taken the appellant had already lodged his First Information Report against the respondent with the Inspector General of Police on 10th December 1958 In connection with that report, investigation by the Police must have been going on though none of the judgments of the lower Courts mentioned what particular steps had been taken in that investigation upto the 11th April 1959, when this complaint was filed by the respondent against the appellant The facts found only mentioned that in connection with that First Information Report of the appellant the respondent was arrested on 18th July 1959 and subsequently the charge sheet was submitted by the Police to the Court of the Magistrate on 25th July 1959 This arrest and submission of the charge sheet were both subsequent to the filing of the complaint by the respondent In these circumstances we have to examine whether the Magistrate at Chandigarh was competent to take cognizance of this complaint on 11th April 1959 in view of the provisions of s 195 of the Code of Criminal Procedure

In dealing with this question of law the important aspect that has to be kept in view is that the point of time at which the legality of the cognizance taken has to be judged is the time when cognizance is actually taken under s 190 Cr P C Under the Code of Criminal Procedure which applies to trials of such cases the only provision for taking cognizance is contained in s 190 S 195, which follows that section is in fact a limitation on the unfettered power of a Magistrate to take cognizance under s 190 Under the latter section cognizance of any offence can be taken by any Presi

dency Magistrate, District Magistrate or Sub Divisional Magistrate and any other Magistrate specially empowered in this behalf (*a*) upon receiving a complaint of facts which constitute such offence (*b*) upon a report in writing of such facts made by any police officer and (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed In the present case, the Judicial Magistrate at Chandigarh had before him the complaint filed by the respondent and if s 190 stood by itself he was competent to take cognizance of it under cl (*a*) of sub s (1) of that section This power of taking cognizance was however subject to the subsequent provisions contained in the Code of Criminal Procedure including that contained in s 195 Sub s (1) of s 195 which is relevant for our purposes is reproduced below

> 195(1) No Court shall take cognizance—(*a*) of any offence punishable under ss 172 to 188 of the Indian Penal Code except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate
>
> (*b*) of any offence punishable under any of the following sections of the same Code, namely ss 193, 194 195 196 199 200, 205 206, 207 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate, or
>
> (*c*) of any offence described in s 463 or punishable under s 471, s 475 or s 476 of the same Code when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding except on the complaint

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in writing of such Court, or of some other Court to which such Court is subordinate

This sub section thus bars any Court from taking cognizance of the offences mentioned in cls (*a*), (*b*) and (*c*), except when the conditions laid down in those clauses are satisfied In the case of an offence punishable under s 211, I P C, the mandatory direction is that no Court shall take cognizance of any offence punishable under this section, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate This provision in cl (*b*) of sub s (1) of s 195 is thus clearly a limitation on the power of the Court to take cognizance under s 190 Consequently, it is at the stage when a Magistrate is taking cognizance under s 190 that he must examine the facts of the complaint before him and determine whether his power of taking cognizance under s 190 has or has not been taken away by cl (*b*) of sub-s (1) of s 195 Cr P C In the present case, therefore, at the time when this complaint was filed by the respondent in the Court of the Judicial Magistrate at Chandigarh it was necessary and incumbent on that Magistrate to examine whether his power of taking cognizance of the offence was limited by the provisions of s 195(1) (*b*) He had therefore, to determine whether cognizance of this complaint charging the appellant with commission of an offence under s 211, I P C could not be taken by him, because that offence was alleged to have been committed in, or in relation to, any proceeding in any Court, and if he found that it was so, whether a complaint in writing by such Court or some other Court to which such Court was subordinate was necessary before he could take cognizance Consequently in deciding this appeal, this Court has to

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examine whether on the date when cognizance was taken by the Judicial Magistrate at Chandigarh such cognizance was barred under s 195(1) (*b*), Cr P C because the offence punishable under s 211 I P C included in the complaint was alleged to have been committed in, or in relation to, any proceeding in any Court

In the interpretation of this cl (*b*) of sub s (1) of s 195, considerable emphasis has been laid before us on the expression in or in relation to , and it has been urged that the use of the expression in relation to very considerably widens the scope of this section and makes it applicable to cases where there can even in future be a proceeding in any Court in relation to which the offence under s 211, I P C , may be alleged to have been committed A proper interpretation of this provision requires that each ingredient in it be separately examined This provision bars taking of cognizance if all the following circumstances exist, viz (1) that the offence in respect of which the case is brought falls under s 211, I P C (2) that there should be a proceeding in any Court, and (3) that the allegation should be that the offence under s 211 was committed in, or in relation to, such a proceeding Unless all the three ingredients exist, the bar under s 195 (1) (*b*) against taking cognizance by the Magistrate, except on a complant in writing of a Court, will not come into operation In the present case also therefore, we have to see whether all these three ingredients were in existence at the time when the Judicial Magistrate at Chandigarh proceeded to take cognizance of the charge under s 211 I P C against the appellant

There is of course, no doubt that in the complaint before the Magistrate a charge under s 211, I P C, against the appellant was included, so that the first ingredient clearly existed The question on which the

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decision in the present cases hinges is whether it can be held that any proceeding in any Court existed when that Magistrate took cognizance If any proceeding in any Court existed and the offence under s 211 I P C in the complaint filed before him was alleged to have been committed in such a proceeding or in relation to any such proceeding the Magistrate would have been barred from taking cognizance of the offence On the other hand if there was no proceeding in any Court at all in which or in relation to which the offence under s 211 could have been alleged to have been committed this provision barring cognizance would not be attracted at all

In this case, as we have already indicated when enumerating the facts, the complaint of which cognizance was taken by the Judicial Magistrate at Chandigarh was filed on 11th April, 1959 and at that stage, the only proceeding that was going on was investigation by the Police on the basis of the First Information Report lodged by the appellant before the Inspector General of Police on 10th December 1958 There is no mention at all that there was at that stage any proceeding in any Court in respect of that F I R When examining the question whether there is any proceeding in any Court there are three situations that can be envisaged One is that there may be no proceeding in any Court at all The second is that a proceeding in a Court may actually be pending at the point of time when cognizance is sought to be taken of the offence under s 211 I P C The third is that though there may be no proceeding pending in any Court in which, or in relation to which the offence under s 211 I P C, could have been committed there may have been a proceeding which had already concluded and the offence under s 211 may be alleged to have been committed

in or in relation to that proceeding It seems to us that in both the latter two circumstances envisaged above the bar to taking cognizance under s 195 (1)(*b*) would come into operation If there be a proceeding actually pending in any Court and the offence under s 211 I P C is alleged to have been committed in relation to that proceeding s 195(1)(*b*) would clearly apply Even if there be a case where there was at one stage a proceeding in any Court which may have concluded by the time the question of applying the provisions of s 195(1)(*b*) arises the bar under that provision would apply if it is alleged that the offence under s 211 I P C was committed in or in relation to that proceeding The fact that the proceeding had concluded would be immaterial because s 195 (1)(*b*) does not require that the proceeding in any Court must actually be pending at the time when the question of applying this bar arises

In the first circumstance envisaged above when there is no proceeding pending to any Court at all at the time when the applicability of s 195(1)(*b*) has to be determined nor has there been any earlier proceeding which may have been concluded the provisions of this sub section would not be attracted because the language used in it requires that there must be a proceeding in Some Court in or in relation to which the offence under s 211 I P C is alleged to have been committed In such a case a Magistrate would be competent to take cognizance of the offence under s 211 I P C if his jurisdiction is invoked in the manner laid down in s 190 of the Code of Criminal Procedure

Mr *Frank Anthony* on behalf of the appellant urged before us that even in those cases where there may be no pending proceeding in any Court, nor any proceeding which has already concluded in any Court the bar

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of s 195(1)(*b*) should be held to be applicable if it is found that a subsequent proceeding in any Court is under contemplation We do not think that the language of cl (*b*) of sub s (1) of s 195 can justify any such interpretation A proceeding in contemplation cannot be said to be a proceeding in a Court When there is mere contemplation of starting a proceeding in future there is no certainty that the proceeding will come into existence It will always be dependent on the decision to be taken by the person who is contemplating that the proceeding be started and any interpretation of the law, which will make the applicability dependent on a future decision to be taken by another person, would in our opinion, be totally incorrect The applicability of this provision at the sweet will of the person contemplating the proceeding will introduce an element of uncertainty in the applicability of the law and such an interpretation must be avoided In this case apart from this circumstance the language used clearly lends itself to the interpretation that the bar has been placed by the Legislature only in those cases where the offence is alleged to have been committed in or in relation to any proceeding actually pending in any proceeding which has already been taken in any Court There is nothing in the language to indicate that the Legislature also intended to lay down this bar if a proceeding in a Court was still under contemplation and if and when that proceeding is taken it may be found that the offence alleged to have been committed was in fact committed in or in relation to that proceeding In this connection the question of time when the applicability of this provision has to be determined assumes importance It appears to us that at the time when in the present case the Judicial Magistrate at Chandigarh had to determine the applicability of this bar he could not be expected to come to a decision

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whether any proceeding in any Court, was under contemplation in, or in relation to, which the offence under s 211, I P C, of which he was asked to take cognizance, was alleged to have been committed In fact, it would be laying on the Magistrate a burden which he could not be expected to discharge properly and judicially as no Magistrate could determine in advance of a proceeding in a Court whether the offence under s 211, I P C of which he is required to take cognizance, will be an offence which will be found subsequently to have been committed in relation to the contemplated proceeding to be taken thereafter This interpretation, sought to be placed on this provision on behalf of the appellant, cannot, therefore be accepted

In this connection reliance was placed by learned counsel for the appellant on series of cases decided by various High Courts In *Re Vasudeo Ramchandra Joshi*, (1) the High Court of Bombay quashed proceedings for prosecution of a lawyer who had instigated some witnesses to give false evidence It appears that a pleader was defending an accused person in a proceeding pending before a Magistrate against his client in respect of a charge under s 401 I P C On 1st April, 1922, an application made by the pleader on behalf of the accused for bail was refused Then the statements of three witnesses were recorded under s 164, Cr P C on 18th April, 1922 and from these statements it appeared that on 10th April, these witnesses had an interview with the pleader who had instigated them to give false evidence On 15th April, another case against the pleader s client in respect of a dacoity was sent up to the Magistrate, and the allegation against the pleader was that it was in connection with this case of dacoity which was sent up to the Magistrate on 15th April, that the pleader had instigated the witnesses to give false

(1) A I R 1923 Bom 103

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evidence. On 2nd June the witnesses were actually examined before the Magistrate in this dacoity case which was sent up on 10th April and then on 7th June a complaint was filed by the Police Officer against the pleader charging him with having abetted the giving of false evidence. It was in these circumstances that the High Court held that the provisions of s. 195(1)(*b*) Cr. P. C. were applicable and the case against the pleader on the charge filed by the Police Officer was not maintainable when there was no sanction by the Magistrate who was enquiring into the dacoity case in relation to which the witnesses were instigated to give false evidence. On the facts it is clear that that case is distinguishable from the case before us. In that case, the charge by the Police Officer was filed on June 7 and on that date a proceeding was already pending before the Magistrate in relation to which the witnesses had been instigated to give false evidence. The provisions of s. 195(1)(*b*) were therefore clearly applicable. Dealing with this matter one of the learned Judges of the High Court held that the words are very general, and are wide enough in my opinion to cover a proceeding in contemplation before a criminal Court though it may not have begun at the date when the offence was committed. If that is so it is plain that sanction was necessary in the present case and therefore the proceedings which have been undertaken are null and void without such sanction. These views expressed by CRUMP, J., had been relied upon by learned counsel in support of his proposition that even if an offence is committed in relation to a proceeding which is in contemplation the provisions of s. 195 (1)(*b*) Cr. P. C. are attracted. We do not think that any such general proposition can be inferred from that decision. It is to be noted that in that case though it was held that the offence of instigation to witnesses to give false evi

dence was committed when proceedings before a criminal Court were still under contemplation in which the witnesses were to appear the actual complaint for that instigation was filed after the Magistrate was already seized of the proceeding in which the witnesses were instigated to give false evidence On the date on which the complaint was filed by the Police Officer charging the pleader with instigation of giving false evidence, there was already a pending proceeding before the Court in relation to which that offence had been committed Consequently the observations in that case should be interpreted as limited to laying down that the provisions of s 195 (1) *(b)* Cr P C will be attracted even if the offence charged was committed while the proceeding was in contemplation and that there was no decision by the Court that the sanction under s 195(1)*(b)* would be necessary even in those cases where the proceeding is still under contemplation on the date when the complaint is filed before the Court for commission of the offence mentioned in section 195(1)*(b)*

In *Ghulam Rasul* v *Emperor* (1) the Police investigated a report that a certain person had stolen the complainant's watch from his car and in the investigation the Police came to the conclusion that the report was false and that the watch had been removed by the complainant himself The case was accordingly reported to the Magistrate for cancellation and then the Police prosecuted the complainant under sections 198 and 211, I P C The learned Judge of the Lahore High Court in dealing with the case held I am clear that the words in this sub section in relation to any proceeding in any Court apply to this case of a false report or a false statement made in an investigation by the police with the intention that there shall in consequence of this be a trial in the criminal Court, and I find support for this

(1) A I R 1936 Lah 288

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view in the case of *Chuhar Mal Nihal Mal* v *Emperor* (1)" The decision in the words in which the learned Judge expressed himself appears to support the argument of learned counsel for the appellant in the present case, but we think that very likely in that case, the learned Judge was influenced by the circumstance that the case had been reported by the Police to the Magistrate for cancellation He appears to have held the view that the Magistrate having passed an order of cancellation, it was necessary that the complaint should be filed by the Magistrate, because s 195(1) (*b*) had become applicable If the learned Judge intended to say that without any proceeding being taken by the Magistrate in the case which was investigated by the Police it was still essential that a complaint should be filed by the Magistrate simply because a subsequent proceeding following the police investigation was contemplated, we consider that his decision cannot be accepted as correct

In *Balak Ram* v *Emperor* (2) it was held that a person who sets the criminal law in motion by making a false charge to the police of a cognizable offence by definitely charging a person with having come to his house for the purpose of dacoity, and insisting for investigation, institutes criminal proceedings within the meaning of s 211 and that criminal proceedings are just as much instituted within the meaning of s 211 when first information of a cognizable offence is given to the Police under s 154, Cr P C, as when a complaint is made direct to a Magistrate under s 200 Cr P C We do not think that these comments made in that case can be interpreted as laying down that criminal proceedings instituted by lodging a First Information Report of a cognizable offence to the Police amount to institution of a criminal proceeding in a Court What the Court in that case

(1) A I R 1939 Sind 182 (2) A I R 1942 Oudh 100

was deciding was that there can be criminal proceedings apart from proceedings instituted by a complaint in Court for purposes of s 211, I P C That decision does not in anyway attempt to lay down that a proceeding in investigation is a proceeding in a Court

In *Ramdeo* v *The State and Another*, (1) the question arose about the applicability of s 195 to a complaint made for an offence under s 182, I P C by a Police Officer for giving false information to him in a report lodged by an informant In that connection, the Court considered the scope of s 195 and held that an offence under s 211 I P C, in connection with a false charge made before the Police is an offence committed in relation to proceedings in a Court contemplated at the time of lodging information with the Police But in that case again the complaint by the Police was held to be incompetent only on the further basis that the proceedings under contemplation at the time when the offence under s 211 I P C, was committed by lodging the report, were actually instituted later This institution of that case took place before the Police lodged the complaint for the offence under s 182, I P C Thus this was again a case where a proceeding was actually pending in a Court at the time when cognizance of the offence under s 182 was taken, and it was held that the charge under s 182 was covered by a charge under s 211, I P C and that the latter offence had been committed in relation to the proceeding which had come into existence in the Court at the time of taking cognizance

In *Har Prasad* v *Hans Ram* (2), a private complaint was filed before a Magistrate disclosing commission of offences under ss 467 and 471, I P C, at a time when there were no proceedings pending in any Court These offences were committed for the purpose of using the

(1) A I R 1962 Raj 149 (2) A I R 1966 All 124

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forged documents in the Court of the Tahsildar who was to deal with subsequent mutation proceedings and they were in fact so used subsequently. It was in these circumstances that the Court held that the words "in respect of" in s. 195(1) (c) were wide enough to include even a document which was prepared before the proceedings started in a Court of law but was produced or given in evidence in that proceeding. It was further held that in this view of the matter although the document was fabricated before the proceedings started in Tahsildar's Court and although two of the opposite parties were not impleaded in the mutation proceedings, it must be held that the cognizance of the offence was barred by s. 195(1) (c). Once again it will be noticed that all that the Court disregarded was the fact that the substantive offence mentioned in s. 195 was committed for a proceeding which was under contemplation but the proceedings in Court for that offence were held barred by s. 195 only because subsequently, proceedings in the Court of the Tahsildar were actually taken and the documents concerned were used in it and were found to have been forged in relation to those proceedings. On the date on which the cognizance was taken, the proceeding in relation to which the offence had been committed, was already pending.

In the *Queen* v. *Subbanna Goundan* (1) it was found that some persons were convicted under s. 211, I.P.C. for falsely charging the complainant with having committed the offence of highway robbery knowing that there was no just or lawful ground for such charge. The charge had been preferred before an Inspector of Police, who disbelieved and refused to act upon it. It was held that to constitute the offence of preferring a false charge contemplated in s. 211, I.P.C., it was not necessary that the charge should be before a Magistrate.

(1) (1862 & 1863) 1 Madras High Court Reports 80

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In that connection, the Court further held that it is enough in a case like that one if it appear that the charge was still not pending and that an indictment for falsely charging could not be sustained if the accusation were entertained and still remained under proper legal enquiry Reliance is placed on the last dictum that an indictment for falsely charging, as in the present case, cannot be sustained while the accusation made in that alleged false charge is still under proper legal enquiry In the present case, there is no doubt that at the stage when the complaint was filed by the respondent against the appellant for the offences under s 204 211 and 385 I P C enquiry on the First Information Report lodged by the appellant was still being conducted by the Police In such a case there may be no justification for the Police bringing a charge of false information being given to it until the investigation is completed But we do not find any requirement anywhere in law that the person affected by the false charge could not file his complaint in Court until the Police had decided that the charge was false The discretion of the person affected by the false charge was not to be fettered or tied down to the view taken by the Police

The case of *Gati Mandal* v *The Emperor* (1) is against no help because in that case also the only principle that was laid down was that a Magistrate had no jurisdiction to order a prosecution for making a false complaint, till the complaint was dismissed That case does not relate to the right of a private person to file a complaint at a stage when no case is pending in any Court against him and no question of intervention of any Court under s 195, Cr P C , arises

In *Fakir Mahomed* v *Emperor* (2) it was held that if there is no complaint by a public servant as required

(1) 4 Cr L J 88 (2) 37 Cr L J 1105

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by s 195, the defect cannot be said to be an error, omission or irregularity in a complaint, because the complaint was never made Before an error, omission or irregularity in a complaint can be cured the complaint must exist, and consequently, the provisions of s 537, Cr P C, cannot apply In such a case, the trial without a complaint as required by s 195 would be void These comments brought to our notice do not have any particular bearing on the question that we are called upon to examine In the same case the Additional Judicial Commissioner of Sind interpreted the effect of s 195, Cr P C He was of the view that "section 195, though it forms a part of the Code of Procedure in reality contains a provision of the substantive law of crimes For s 195 does not deal with the competency of the Courts, nor lays down which of several Courts shall, in any particular matter, have jurisdiction to try the case, and yet the language of s 195 is apt to these matters, and it forms part of the Chapter entitled 'of the jurisdiction of the Criminal Courts in enquiries and trials' S 195 in reality lays down that the offences therein referred to (for rather the acts constituting those offences) shall not be deemed to be any offences at all except on the complaint to the persons or the Courts therein specified, it enhances the connotation of those offences and limits the scope of their definition This limitation of the definition is brought about by saying that no Court shall take cognizance of the offences unless this condition, requisite for initiation of proceedings, is satisfied"

Relying on these observations, learned counsel for the appellant urged before us that in this case also, we should hold that no offence under s 211 could come into existence and no charge for that commission could be brought against the appellant, unless there was a com-

plaint by a Court under s 195, Cr P C We are unable to agree with the view expressed by the learned Additional Judicial Commissioner that s 195, Cr P C, really lays down that the offences therein referred to shall not be deemed to be any offences at all, except on the complaint of the persons or the Courts therein specified An offence is constituted as soon as it is found that the acts which constitute that offence have been committed by the person accused of the offence It remains an offence whether it is triable by a Court or not If a law prescribes punishment for that offence the fact that the trial of that offence can only be taken up by courts after certain specified conditions are fulfilled does not make that offence any the less an offence The limitation laid down by s 195 Cr P C is, in fact, a limitation only on the power of Courts to take cognizance of, and try, offences and does not in anyway have the effect of converting an act which was an offence, into an innocent act We cannot, therefore, subscribe to the view expressed in that case There is the further circumstance that in the case before us we have held that the provision contained in s 195(1)(*b*) was not applicable at the time when the Judicial Magistrate at Chandigarh took cognizance of the offence, and consequently, this principle sought to be laid down by the Additional Judicial Commissioner of Sind has no application

In *Gunamony Saput* v *Queen Empress* (1) the High Court of Calcutta dealt with a case in which a complaint had been lodged by one Syambar, accompanied by Gunamony, charging certain persons with murder and other offences The Police after investigation made a report to the effect that the information was false, and thereupon, the Magistrate directed proceedings to be taken against Syambar and Gunamony to show cause why

(1) (1898 99) III C W N 755

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they should not be prosecuted. Syambar, who had made the report, then appeared before the Magistrate, and repeating the information contained in his report to the Police he asked for an enquiry which was ordered by the Magistrate. Once again a report was made by the Police that the complaint was false. Thereupon the Magistrate without putting an end to that complaint of Syambar by dismissing it under s. 203 or passing any other order as he might think fit instituted proceedings against Gunamony under s. 211 I.P.C. On these facts the High Court held that the proceedings against Gunamony must be quashed because there was no final order by the Magistrate on the complaint of Syambar dismissing his complaint and that complaint was still pending. On the analogy to this case it was urged by learned counsel that in this case also the proceedings against the appellant should be quashed on the ground that at the stage when the respondent filed his complaint against the appellant the proceedings being taken by Police on the report of the appellant had not come to an end. We do not think that the two cases can be compared. In that case the proceedings were in Court and the Court filed a complaint for bringing false charge or institution of false criminal proceedings without putting an end to those proceedings. In the case before us there were no proceedings before any Court on the basis of the report lodged by the appellant at the time when the respondent filed his complaint. It was not at all necessary that the proceedings being taken by the Police should terminate before the Court could competently take cognizance of this complaint filed by the respondent against the appellant.

In *K. Ramaswami Iyengar* v. *K. V. Panduranga Mudaliar* (1) a learned Judge of the Madras High

(1) A.I.R. 1938 Mad. 173

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Court dealing with the principle underlying s 195, Cr P C, held "Where an act amounts to the offence of contempt of the lawful authority of public servants (ss 172—188, I P C) or to an offence against public justice such as giving false evidence (s 193 *et seq*, I P C) or to an offence relating to documents actually used in a Court (s 471 etc) private prosecutions are barred absolutely and only the Court, in relation to which the offence was committed, may initiate proceedings This salutary rule of law is founded on common sense The dignity and prestige of Courts of law must be upheld by their presiding officers and it would never do to leave it to parties aggrieved to achieve in one prosecution gratification of personal revenge and vindication of a Court's honour and prestige To allow this would be to sacrifice deliberately the dispassionate and impartial calm of tribunals and to allow a Court's prestige to be the sport of personal passions We are unable to interpret these views expressed by the Madras High Court as implying that private prosecution for the offences mentioned in cls (*b*) and (*c*) of sub s (1) of s 195 Cr P C are barred absolutely and under no circumstances can such offences be brought before courts by private persons In the case of cl (*b*), there is the clear limitation that private prosecutions are barred only if the offence mentioned in that section was alleged to have been committed in or in relation to any proceeding in any Court If the offence was not committed in or in relation to, any proceeding in any Court a private complaint is clearly permissible The question of upholding the dignity and prestige of courts of law only arises after there are proceedings in the Courts and not at the stage when no such proceedings have been instituted or have come into existence in any Court In the present case we have already indicated that the cogni

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zance of the complaint filed by the respondent against the appellant was taken at a stage when there was no proceeding in any Court of law and consequently, at that stage, there could be no question of dignity or prestige of a court of law being upheld or of a private complaint being barred

In *Emperor v. Hardwar Pal* (1) the complaint in question was held to clearly constitute an offence under s 182 I P C but the High Court accepted the view held in earlier cases that the facts in the complaint also constituted an offence under the first part of s 211, I P C The High Court was called upon to decide whether in those circumstances cognizance of the complaint for the offence under s 182 I P C on the complaint of the Police Officer concerned could be competently taken when the case related to false information report made to the police on the basis of which a case was sent up to Court and was tried by a Magistrate The Court held that the complaint under s 182, I P C could not be proceeded with, because, on the basis of the alleged false report the Police made an inquiry and sent up some accused for trial, and the offence which had been committed under the first paragraph of s 211 by falsely implicating an accused in the report, was one committed in relation to a proceeding in court It was held to be obvious that there was considerable relation between the first report and the proceeding in Court, for the latter was the result of the former The report led to the police inquiry and the inquiry to the proceeding in court Consequently, the offence committed was one under s 211 in relation to a proceeding in court and sanction of the Court was necessary This case, again, does not, therefore, indicate that any view was taken contrary to our opinion expressed above

(1) I L R 34 All 522

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Two other cases brought to our notice are *A T Krishnamachari* v *Emperor* (1), *Badri* v *State* (2) In the former case, a statement was recorded under s 164, Cr P C, by a Magistrate in relation to a case which was subsequently tried on that matter Even though the Court, which tried the case, had not recorded the statement under s 164, it was held that it was competent for that Court, on an application under s 476 to make a complaint against the person in respect of a statement made by him to another Magistrate under s 164, Cr P C This was again a case where the statement under s 164, Cr P C, was found to relate to a proceeding that subsequently came into existence in a Court, and the question filing the complaint for the offence of making that false statement or of taking cognizance in respect of that offence only arose after that proceeding in Court had already come into existence

In the case of *Badri* v *State* (2) where an offence under s 211 I P C, was alleged to have been committed by the person making a false report against the complainant and others to the Police, it was held that it was an offence in relation to the remand proceeding and the bail proceedings which were subsequently taken before a Magistrate in connection with that report to the Police and, therefore, the case was governed by section 195(1) (*b*), Cr P C and no cognizance of the offence could be taken except on a complaint by the Magistrate who held the remand and bail proceedings We do not consider it necessary to express any opinion whether the remand and bail proceedings before the Magistrate could be held to be proceedings in a Court nor need we consider the question whether the charge of making of the false report could be rightly held to be in relation to those proceedings That aspect need not detain us because,

(1) A I R 1938 Mad 767 (2) I L R (1968) II All 869

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in the case before us the facts are different. The complaint for the offence under s. 211 I.P.C. was taken cognizance of by the Judicial Magistrate at Chandigarh at a stage when there had been no proceedings for arrest remand or bail of the respondent and the case was still entirely in the hands of the Police. There was in fact no order by any Magistrate in the proceedings being taken by the Police on the report lodged by the appellant up to the stage when the question of applying the provisions of s. 195(1)(*b*) Cr. P.C. arose. These two cases are also therefore of no assistance to the appellant. On the same ground the decision of the Bombay High Court in *J. D. Boywalla* v. *Sorab Rustomji Engineer* (1) is also inapplicable because in that case also orders were passed by a Magistrate on the final report made by the Police after investigation of the facts in the report in respect of which the complaint under s. 211, I.P.C. was sought to be filed.

In support of his proposition that no criminal complaint under s. 211 I.P.C. can be filed by a private person if the First Information Report is under investigation and relates to a cognizable offence Mr. *Anthony* urged that we should examine the scheme of the Code of Criminal Procedure relating to investigation contained in ss. 154 to 173 of that Code and should hold that this scheme itself envisages that invariably the proceedings of investigation will terminate in a judicial order by a Magistrate and while such proceedings are pending it should not be permissible for a private person to file the complaint on the ground that the report under investigation was a false one. It is perfectly correct that when a report of a cognizable offence is made a duty is cast on the Police Officer in charge of the station to investigate that case, and in certain cases of

(1) A.I.R. 1941 Bom. 295

serious offences immediate report has to be sent to the Magistrate who has power to take cognizance of the offences There is however nothing in these sections to indicate that the Magistrate is required to intervene in the investigation until the investigation is completed and the investigating officer arrives at some conclusion in accordance with s 169 or s 170 Cr P C After arriving at his conclusion under either of those two sections he has to submit a report to the Magistrate empowered to take cognizance of the offence under s 173 If his conclusion is covered by the provisions of s 170 Cr P C the report submitted by the investigating officer will necessarily show that a cognizable offence has been committed and such a report will satisfy the requirements of s 190 (1) (b) Cr P C On that report therefore the Magistrate concerned can take cognizance and proceed with the trial of the case On the other hand if the report is based on conclusions envisaged in s 169 Cr P C the report will contain facts found by the Police Officer and would normally indicate that no such offence was committed of which he could recommend a trial by the Magistrate Even on the receipt of such a report the Magistrate is of course competent to take cognizance under s 190(1) (b) if he is of the opinion that the facts stated in the report of the Police constitute an offence On the other hand if those facts do not constitute an offence no cognizance of the case can be taken by the Magistrate though he can order further investigation If he does not choose to order further investigation all that the Magistrate has to do is to make an order under sub s (3) of s 173 Cr P C discharging the bond if the accused has been released by the Police on his bond

This scheme of investigation and its termination contained in these sections of the Code of Criminal Procedure came up for consideration in several cases In

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Appa Ragho Bhogle v *Emperor*, (1) it was held that a case which was investigated by the police under authority of a Magistrate under s 155, Cr P C, could not be disposed of without the order of the Magistrate in some form or another after a report was submitted to him In *State* v *Vipra Khimji Gangaram*, (2) it was held that where information relating to the commission of a cognizable offence is given to an officer in charge of a Police Station under s 154, Cr P C, and is followed by investigation by him, he is bound under s 173(1) to forward his final report to a Magistrate empowered to take cognizance of the offence on a police report This Court also, in *H N Rishbud and Inder Singh* v *The State of Delhi*, (3) examined the scheme of these provisions of the Code of Criminal Procedure and held that upon the completion of investigation, the investigating officer has to submit a report to the Magistrate under s 173, Cr P C in the prescribed form, furnishing various details, whether it appears to him that there is no sufficient evidence or reasonable ground, or whether he finds that there is sufficient evidence or reasonable ground to place the accused on trial Similar observations were made by the Bombay High Court in *State* v *Murlidhar Govardhan* (4) In two of these cases viz *State* v *Vipra Khimji Gangaram* (2) and *State* v *Murlidhar Govardhan* (4) the Courts further held that when a Magistrate passes an order on the proceedings under s 173, Cr P C that order is a judicial order made by him For purposes of considering the effect of these cases in the case before us it is not at all necessary to express any opinion on the correctness of the view that the order passed under s 173 Cr P C by the Magistrate is a judicial order when he either discharges the bond under sub s (3) of s 173, or takes cognizance under s 190(1) (*b*) Cr P C Even if it be accepted that the

(1) Cr. L. J. 161
(3) (1955) 1 S C R 1150
(2) A I R 1952 Saur 67
(4) A I R 1950 Bom 340

final orders to be made by the Magistrate are judicial orders, the only conclusion that follows is that at the last stage, on receipt of the report under s 173, the Magistrate has to act in his judicial capacity Until that stage is reached there is no intervention by the Magistrate in his judicial capacity or as a Court Consequently, until some occasion arises for a Magistrate to make a judicial order in connection with an investigation of a cognizable offence by the police no question can arise of the Magistrate having the power of filing a complaint under s 195(1) (*b*) Cr P C In such circumstances if a private person aggrieved by the information given to the police files a complaint for commission of an offence under s 211 I P C at any stage before a judicial order has been made by a Magistrate there can be no question on the date on which cognizance of that complaint is taken by the Court of the provisions of s 195(1) (*b*) being attracted because on that date there would be no proceeding in any Court in existence in relation to which the offence under s 211, I P C, can be said to have been committed The mere fact that on a report being made to the police of a cognizable offence, the proceedings must, at some later stage and in a judicial order by a Magistrate cannot therefore stand in the way of a private complaint being filed and of cognizance being taken, by the Court on its basis

The last submission made on behalf of the appellant was that a very anomalous position can arise if a private person is allowed to file a complaint that the report to the police against him is false before investigation is completed It was urged that there can be cases where a report may be lodged against a person for commission of a serious offence like murder, and while investigation is still going on the accused may file a complaint against

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the person who lodged the report under s 211, I P C for making a false report Subsequently, when the police prosecute that accused there would simultaneously be two trials in one of which the person accused of the murder would be under trial while in the other case the person who lodged the First Information Report would appear as the accused It was suggested that a person accused of a serious crime should not be given the advantage of putting his complainant in jeopardy by instituting a case against him for the offence under s 211 I P C We are unable to hold that it is necessary to interpret the law in such a way as to necessarily avoid such a situation There appears to be no difficulty in both cases being tried together in the same Court or one after the other by different Courts In fact, even if we were to accept the submission made on behalf of the appellant a similar situation can still arise There may be a case where the police may report to the Magistrate that the First Information Report was false and in such a case according to the submissions made by learned counsel for the appellant the Magistrate receiving the report under s 173 Cr P C, would be competent to file a complaint against the informant for the offence under s 211 I P C in exercise of his power under s 195(1)(*b*) Cr P C At the same time there would be no bar to that informant filing a complaint direct in the Court of the Magistrate on the basis of his F I R so that, again there can be two trials in the Court in one of which the informant would be the accused and in the other the person charged in the First Information Report would be the accused The situation will not therefore differ whether we accept the submission made on behalf of the appellant or do not do so This aspect is therefore not at all helpful in interpreting the scope of s 195(1) (*b*) Cr P C We conse

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quently, hold that in this case the complaint which was filed by the respondent, was competent and the Judicial Magistrate at Chandigarh, in taking cognizance of the offence only exercised jurisdiction rightly vested in him He was not barred from taking cognizance of the complaint by the provisions of s 195(1)(*b*) Cr P C

In this case, one more point that was canvassed before us was that the two offences under ss 204 and 389 I P C which were included in the complaint of the respondent were so inter mixed with the offence under s 211 I P C that a trial for those two offences could not proceed if the trial for the offence under s 211, I P C was barred by s 195(1)(*b*) Cr P C That question need not be dealt with by us in view of our decision that cognizance of the offence under s 211 I P C has been rightly taken and the trial for that offence is not vitiated The appeal fails and is dismissed

Appeal dismissed

CIVIL MISCELLANEOUS

*Before Mr Justice Jagdish Sahai and Mr Justice R Chandra**

SYED ASHFAQ HUSAIN AND OTHERS
PLAINTIFFS
APPELLANTS,

v

WAQF ALAL NAFS AND ALALAULAD AND ALAL AYAL THROUGH SMT ZAHIDA KHATOON
DEFENDANT
RESPONDENT

U P Consolidation of Holdings Act, 1953 ss 5 49 *and* Code of Civil Procedure, 1908 s 9—*Disputes relating to tenure holders rights in respect of agricultural holding can be decided by the Consolidation authorities—relief claimed for possession over proprietary rights in respect of certain zamindari villages—who entitled to compensation and rehabilitation amount—Dispute cannot be decided by the Consolidation authorities—Appeal from such dispute not hit by* s 5

Consolidation authorities are tribunals of limited jurisdiction They are not courts of civil or revenue courts with the result that they cannot adjudicate upon any matter in respect of which there is no express provision permitting them to adjudicate upon It is well settled that the bar to the jurisdiction of civil courts cannot be readily inferred and that their jurisdiction can be barred only by an express provision or one from which such a bar can be inferred by necessary implication S 49 of U P Consolidation of Holdings Act bars proceeding in a civil or revenue court only in respect of such matters which could be adjudicated upon or have been completely adjudicated upon by a consolidation authority The bar does not extend to matters which are beyond the purview or competence of the consolidation authorities to decide

The function of the consolidation authorities are limited to deciding questions relating to tenure holder s right only that is rights of *bhumidhars* or *sirdars* or *asamis* in respect of agricultural holdings and beyond this they can decide nothing Consolidation authorities are not competent to decide question of proprietorship

*While sitting at Lucknow

The relief in the present case is for possession over proprietary rights in respect of certain *zamindari* villages Admittedly these rights now vests in the State of U P but clearly one of the parties to this litigation is entitled to the compensation and the rehabilitation amounts in respect of these villages As to who is entitled to compensation and rehabilitation amounts cannot be determined by the consolidation authorities and as such this appeal neither can be stayed nor has abated under the provisions of s 5 of the Act

Case law referred

Civil Misc Application No 171(F) of 1966 arising out of First Civil Appeal No 4 of 1949 against the judgment and decree, dated October 16, 1948 passed by B P TANDON, Civil Judge Hardoi in Reg Suit No 11 of 1948

Facts appear in the judgment

Harish Chandra, for the Appellant

Mohd Husain, for the Respondents

The following judgment of the Court was delivered by—

JAGDISH SAHAI, J —By means of this application it has been prayed by the respondents that inasmuch as a dispute is pending between the parties before the consolidation authorities in respect of the *bhumidhari* plots falling in the villages mentioned in the plaint giving rise to this appeal, the hearing of the present appeal be stayed under the provisions of s 5 of the U P Consolidation of Holdings Act (hereinafter referred to as the Act)

Mr *Mohammad Husain*, who has appeared for the applicant, places reliance upon *Mushar* v *Ahmad Khan* (1), *Dalal* v *Baroo* (2), *Smt Ram Kuer* v *Jangi* (3) and *Ram Lal* v *Assistant Collector, Sadabad, district Mathura* (4)

(1) 1962 A L J 664
(2) 1963 A L J 865
(3) 1964 A L J 713
(4) 1966 A L J 966

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This application is opposed by Sri *Harish Chandra*, who contends that the reliefs sought in this case can not be granted by the consolidation authorities with the result that s. 9 of the Act would not apply and the hearing of the appeal cannot be stayed.

This arises out of suit no. 11 of 1948. The reliefs claimed in the plaint read:

> (A) A decree for proprietary and actual possession in respect of 3/4th shares of the property made *waqf* and the property given in para 2 of this plaint may be passed in favour of the plaintiff against the defendant or the proper defendant.
>
> (B) Any other relief which may be consonant with justice and be admissible on the merits of the case may be granted to the plaintiff against the defendants and the *mesne profits* during the pendency of the suit be made payable on the payment of court fee.
>
> (C) The cost of the suit may be made payable by the defendants.

The case set up in the plaint is that Khwaja Basit Husain the brother of the plaintiff Khwaja Syed Kazim Husain Gailani, was the owner of certain *zamindari* property in respect of which the respondent no. 2, who was a young and newly married wife of Khwaja Basit Husain got the latter to make *waqf* with a view to defeat the right of inheritance of the plaintiff. It was also pleaded that for several reasons the *waqf* was illegal and ineffective. The suit was contested on several pleas. The exact nature of the pleadings of the parties would appear from the issues framed in the suit, which read:

> 1. Is the *waqf* deed invalid for any of the reasons alleged in para 8 of the plaint?

2 Does there obtain any custom set up in part 25 of the written statement ?

3 (*a*) Whether any portion of the dower debt of defendant no 2 remains unpaid ?

(*b*) If so to what effect

4 To what relief is plaintiff entitled ?

The suit was dismissed with costs by the learned Civil Judge, Hardoi who tried it and this appeal is directed against that decree

Admittedly the *zamindari* property in respect of which the suit was filed now vests in the State of U P The dispute between the parties would therefore now be confined only to the compensation amount in respect of this property in deposit in the court of the learned Civil Judge Hardoi and the rehabilitation bonds which are with the Compensation Officer Hardoi We are informed that in the *zamindari* property to which the suit giving rise to this appeal related were situated some *sir* and *khudkasht* plots also belonging to Khwaja Basit Husain or the *waqf* and there is dispute between the parties in respect of those plots However it is clear from the pleadings of the parties that those plots are not directly involved in the present appeal

Mr *Mohd Husain* contends that any dispute with regard to *bhumidhari* and *sirdari* plots can be adjudicated upon only by the forums provided by the Act and not in civil courts and that inasmuch as the *sir* and *khudkasht* plots belonging to Khwaja Basit Husain or the *waqf* are now *bhumidhari* plots the consolidation authorities alone can decide as to who is the *bhumidhar* of the same the plaintiff or the defendants Mr *Mohd Husain* adds that if the suit is looked at, as a whole, it would appear that now the dispute substan

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tially is with regard to *bhumidhari* plots and for that reason the hearing of the appeal should be stayed

It is the admitted case of the parties that the village in which the *bhumidhari* plots aforesaid lie are under consolidation operations It is also admitted that there is a dispute between the parties in respect of those plots S 5 of the Act as it originally stood read

> 5 *Effect of declaration*—(1) Upon the publication of the declaration under s 4 the district or the local area as the case may be, shall be deemed to be under consolidation operations from the date of such publication until the publication of the notification under s 52 in the Official *Gazette* to the effect that the consolidation operations have been closed
>
> (2) Where a district or any other local area is under consolidation operations the duty of preparing and maintaining the maps the *khasra* and the annual register under Chap III of the U P Land Revenue Act 1901 shall stand transferred to the Settlement Officer (Consolidation) and thereupon all the powers conferred on the Collector, Assistant Collector and the Tahsildar under the said Chap shall so long as that district or the area remains under consolidation operations be exercised respectively by the Settlement Officer (Consolidation) Consolidation Officer and the Assistant Consolidation Officer

This provision was amended and in 1966 it stood in the following form until it was amended by U P Act No XXI of 1966

> 5 *Effect of notification under s* 4(2)—Upon the publication of the notification under [sub s (2) of s 4] in the official *Gazette*, the consequences as hereinafter set forth shall subject to

the provision of this Act, from the date specified thereunder till the publication of notification under s 52 or sub s (1) of s 6 as the case may be ensue in the area to which the [notification under sub s (2) of s 4] relates namely—(a) the district or part thereof as the case may be shall be deemed to be under consolidation operations and the duty of maintaining the record of rights and preparing the village map the field book and the annual register of each village shall be performed by the District Deputy Director of Consolidation who shall maintain or prepare them as the case may be in the manner prescribed

(b) (i) all proceedings for correction of the records and all suits for declaration of rights and interests over land or for possession of land or for partition pending before any authority or court whether of first instance appeal or reference or revision shall stand stayed but without prejudice to the right of the persons affected to agitate the right or interests in dispute in the said proceedings or suits before the consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder

(ii) the findings of consolidation authorities in proceedings under this Act in respect of such right or interest in the land (shall be accepted by) the authority or court before whom the proceeding or suit was pending which may on communication thereof by the parties concerned proceed with the proceeding or suit as the case may be

(c) notwithstanding anything contained in the U P Zamindari Abolition and Land Reforms Act 1950 (U P Act I of 1951) no tenure holder except with the permission in writing of the

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settlement Officer (Consolidation) previously obtained shall—

(i) use his holding or any part thereof for purposes not connected with agriculture horticulture or animal husbandry including pisciculture and poultry farming or

(ii) transfer by way of sale gift or exchange any part of his holding in the consolidation area

Provided that a tenure holder may continue to use his holding or any part thereof for any purpose for which it was in use prior to the date specified in the notification issued under [sub s (2) of s 4]

U P Act No XXI of 1966 so far as relevant for our purposes reads

2 The existing s 5 of the Uttar Pradesh Consolidation of Holdings Act 1953 (hereinafter called the principal Act) shall be renumbered as sub s (1) thereof, and

(i) cl (b) of sub s (1) as so renumbered shall be omitted and

(ii) after sub s (1) as so renumbered the following new sub section shall be added namely

(2) Upon the said publication of the notification under sub s (2) of s 4 the following further consequences shall ensue in the area to which the notification relates namely—

(a) every proceeding for the correction of records and every suit and proceedings in respect of declaration of rights or inter

est in any land lying in the area or for declaration or adjudication of any other right in regard *to which proceedings can or ought to be taken under this Act* pending before any court or authority whether of the first instance or of appeal reference or revision shall on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard

Provided further that on the issue of a notification under sub s (1) of s 6 in respect of the said area or part thereof every such order in relation to the land lying in such area or part as the case may be shall stand vacated

(*b*) such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made there under

9 In s 29 C of the principal Act —

(*i*) for sub s (2) the following shall be substituted, namely —

(2) The provision of s 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950 shall *mutatis mutandis* apply to such land as if the land had vested in the

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Gaon Sabha by virtue of a declaration made by the State Government under sub-s (1) of that section and as if the declaration were made subject to the conditions respecting utilisation specified in sub-s (1) of this section (iii) sub-s (3) shall be omitted

If the submissions of Sri *Mohd. Hasan* are correct the result would that the hearing of the appeal would not be stayed but the appeal itself would be declared to have abated

It is clear that before s 5 applies the dispute between the parties must be such which can be adjudicated upon by the consolidation authorities S 49 of the Act reads

> Notwithstanding anything contained in any other law for the time being in force the declaration and adjudication of rights of tenure holders in respect of land lying in an area for which a notification has been issued under s 4 or adjudication of any other rights arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act shall be done in accordance with the provisions of this Act and no civil or revenue court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act

This provision shows that if a matter could or ought to have been taken under the Act before the consolidation authorities it shall not be adjudicated upon in any civil or revenue court nor shall any declaration and adjudication of rights of tenure holders in respect

of land lying in an area under consolidation operations be questioned in any civil or revenue court

A study of the provisions of the Act reveals that the Act is a self contained code so far as the consolidation matters are concerned It has created its own tribunals for the decision of matters relating to consolidation of agricultural holdings The consolidation authorities are tribunals of limited jurisdiction and are not civil or revenue courts Therefore in order to apply s) of the Act it is necessary to determine as to what are the matters in respect of which the special tribunals created by the Act can adjudicate and in respect of which the jurisdiction of the civil or revenue courts is barred

The long title of the Act reads

> An Act to provide for the consolidation of agricultural holdings in Uttar Pradesh for the development of agriculture

The preamble of the Act reads

> Whereas it is expedient to provide for the consolidation of agricultural holdings in Uttar Pradesh for the development of agriculture

Reading the two together it is clear that the Act has been passed in order to consolidate agricultural holdings with a view to develop agriculture The consolidation authorities therefore can be seized only of those matters which relate to the consolidation of agricultural holdings and no more S 3(5) defines land and reads

> Land means land held or occupied for purposes connected with agriculture horticulture and animal husbandry (including pisciculture and poultry farming) and includes—
>
> (i) the site being a part of a holding of a house or other similar structure and

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(n) trees wells and other improvements existing on the plots forming the holding

S 3(4 C) defines holding and reads

Holding means a parcel or parcels of land held under one tenure by a tenure holder singly or jointly with other tenure holders

From the aforesaid definition clauses it follows that the word land has been used in the Act in the sense of land occupied for agriculture purposes or land which forms part of parcel or parcels of land held under one tenure The word tenure can apply only to agricultural land It is clear that only agricultural plots fall within the jurisdiction of the consolidation authorities Cl (c) of s 5 of the Act clearly provides that no tenure holder except with the permission in writing of the Settlement Officer (Consolidation) previously obtained shall use his holding or any part thereof for purposes not connected with agriculture, horticulture or animal husbandry including pisciculture and poultry farming or transfer by way of sale gift or exchange any part of his holding in the consolidation area This again shows that it is only agricultural land or land which is subject to a land tenure that is capable of being adjudicated upon by a consolidation authority under the provisions of the Act S 3(2) of the Act defines consolidation and reads

Consolidation means re arrangement of holdings in a unit amongst several tenure holders in such a way as to make their respective holdings more compact

Explanation—For the purposes of this clause holding shall not include the following

(i) land which was grove in the agricultural year immediately preceding the year in which the notification under s 4 was issued

(ii) land subject to fluvial action and intensive soil erosion

(iii) land mentioned in s 132 of the U P Zamindari Abolition and Land Reforms Act 1950

(iv) such compact areas as are normally subject to prolonged water logging

(v) *usar*, *kallar* and *nhalo* plots forming a compact area including cultivated land within such area

(vi) land in use for growing *pan* rose *bela* jasmine and *henna* and

(vii) such other areas as the Director of Consolidation may declare to be unsuitable for the purpose of consolidation Tenure holder has been defined in s 3(11) of the Act which reads

Tenure holder means a *bhumidhar* or *sirdar* of the land concerned and includes an *asami*

From these two provisions together it clearly follows that consolidation means re arrangement of holdings between the *bhumidhars* and *sirdars* of the agricultural land falling in the village This again would show that the functions of consolidation and for that reason of consolidation authorities are confined to the consolidation of the plots of the various *bhumidhars* or *sirdars* or *asamis* in a village so that compact areas may be formed and thus help in larger agricultural production

S 5 of the Act which we have already reproduced earlier also shows that it is only in respect of agricultural plots or agricultural holdings that consolidation operations take place and the operations are taken with a view to consolidate the agricultural plots There is no provision in the Act under which civil rights of a

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SYED ASHFAQ HUSAIN v. WAQF ALAL NAFS AND ALALAULAD (NO ALAD) AYAL THROUGH SMT. ZAHIDA KHATOON

Jagdish Sahai J.

party can be determined The consolidation authorities are not competent to decide questions of proprietorship and are confined only to deciding questions relating to land tenure that is to say relating to rights of tenure holders which means those of *bhumidhars* or *sirdars* or *asamis* What we are saying finds support from the provisions of ss 9 9A 9B 9C and 10 of the Act also It would be noticed that s 8 provides for the revision of field book and current annual registers and s 8A for the preparation of Statement of Principles S 9 clearly provides that when the records and statements mentioned in ss 8 and 8A have been prepared and published notices shall issue to the tenure holders concerned and other persons interested It would be noticed that the records that are sought to be revised under s 8 of the Act are those relating to tenure holder plots and the statement of principles prepared under s 8A also relate to agricultural plots of tenure holders S 9 of the Act also requires that notices shall be sent to the tenure holders or persons interested i e those who claim to be tenure holders S 9A of the Act provides that the objections in respect of land (agricultural land) and partition of joint holdings shall be decided S 9C(2) of the Act provides that the partition of joint holdings shall be effected on the basis of shares provided that where the tenure holders concerned agree it may be effected on the basis of specific plots S 10 of the Act provides for preparation and maintenance of revised annual registers on the basis of the orders passed under ss 9A(1) and (2) of the Act All these provisions clearly show that the dispute contemplated is only in respect of tenure holder rights in agricultural land and it is only those rights that are adjudicated upon by the consolidation authorities S 12A of the Act provides that the Settlement Officer (Consolidation) may determine

the amount of land revenue payable by a tenure holder and s 12 D of the Act provides that two or more tenure holders may at any time before the publication of the revised annual register under sub s (1) of s 10, apply to the Consolidation Officer to amalgamate their holdings of like tenure on such terms as may be agreed upon between them From these provisions also it clearly follows that it is only the tenure holder s right in respect of the agricultural land which are the subject matter of decision before the consolidation authorities S 19 speaks of the conditions to be fulfilled by a consolidation scheme and deals with the rights and liabilities of a tenure holder the valuation of plots allotted a tenure holder etc S 19 A deals with the preparation of provisional consolidation scheme by the Assistant Consolidation Officer and deals with the allotment made to a tenure holder after determining the valuation of the land vested in the Gaon Sabha or any other local authority S 20 deals with the publication of the provisional consolidation scheme and receipt of objections thereto S 21 of the Act deals with the disposal of objections on the statement prepared under s 19 S 23 of the Act deals with the confirmation of the provisional consolidation scheme and the issue of allotment orders to the tenure holders S 24 of the Act deals with the possession to tenure holders of their *chaks* and for payment of compensation to them for trees S 27 of the Act provides for the preparation of new revenue records on the basis of allotment made to the various tenure holders in the consolidation proceedings and s 28 of the Act provides for delivery of possession to the tenure holders of the plots allotted to them S 32 of the Act deals with the power of a tenure holder to transfer his holding The other provisions in the Act except s 49 of the Act

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WAGHJI HALJI SUMAR AND AHMEDABAD AND ANAL THROUGH ANT ZAMEER KHATOON

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deal with miscellaneous matters with which we are not concerned in this case

We have analysed all the relevant provisions of the Act including the long title and the preamble The result of the analysis is that it becomes clear that it is only in respect of agricultural land and the rights of *bhumidhars sirdars* and *asamis* that the consolidation authorities adjudicate They are no concerned with any other rights or any other land or any other property S 49 of the Act bars proceedings in a civil or revenue court only in respect of such matters which could be adjudicated upon or have been competently adjudicated upon by a consolidation authority The bar does not extend to matters which are beyond the purview or the competence of the consolidation authorities to decide It would be noticed that the words used in s 49 of the Act are the declaration and adjudication of rights of tenure holders in respect of land lying in an area for which a notification has been issued under s 4 or adjudication of any other rights arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act

It is well settled that powers of a tribunal of limited jurisdiction must strictly be culled out from the statute [See *I V D Costs Divisional Engineer, G I P Railway v B C Patel* (1)] That the consolidation authorities are tribunals of limited jurisdiction cannot be doubted We have already said earlier that they are not courts or civil or revenue courts with the result that they cannot adjudicate upon any matter in respect of which there is no express provision permitting them to adjudicate upon It is well settled that the bar to the jurisdiction of civil courts cannot be readily inferred and that their jurisdiction can be barred only by

(1) A I R 1966 S C 11

an express provision or one from which such a bar can be inferred by necessary implication [See *Nagin Sasanal* v *Punjab Bissoi* (1) and *Secretary of State* v *Mask and Co* (2) The relevant words in the Privy Council decision are

> it is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred but that such exclusion must either be expli citly expressed or clearly implied

S 9 C P C confers on all civil courts full jurisdiction to decide all matters relating to civil rights including rights relating to property except those barred by special enactment In other words a civil court would be presumed to have full jurisdiction to decide any question relating to a civil right including a right relating to property unless it can be shown that there is some statute or law under which the jurisdiction is barred expressly or by necessary implication We have fully analysed the provisions of the Act and have come to the conclusion that the functions of the consolidation authorities are limited to deciding questions relating to tenure holders right only that is, rights of *bhumi dhars* or *sirdars* or *assamis* in respect of agricultural holdings and beyond this consolidation authorities can decide nothing

Therefore in considering the present application, we have to see whether the matter is such which could have been or ought to have been decided or is capable of being decided by the consolidation authorities

We have already reproduced *in extenso* the reliefs claimed in the plaint The reliefs is for possession over proprietary rights in respect of certain *zamindari* villages Admittedly those rights now vest in the State of U P, but clearly one of the parties to this litigation

(1) A I R 1952 S C 252 (2) 67 Ind App 222 at p 228

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SYED ASHFAQ HUSAIN v. WAQF ALAL-NAFS AND ALALLAH AND ALAL AVAL THROUGH SMT. ZAHIDA KHATOON

Jagdish Sahai, J

is entitled to the compensation and the rehabilitation amounts in respect of these villages As to who is entitled to the compensation and rehabilitation amounts cannot be determined by the consolidation authorities We, therefore see no reason to hold that the present appeal can either be stayed or has abated under the provisions of s 5 of the Act Mr *Mohd Husain* has contended, on the basis of the authorities mentioned in the opening part of this judgment, that the view of this Court is categorical that whatever may be the nature of rights if it has any relation to agricultural property it can be decided only by the consolidation authorities We are unable to agree In none of the four cases cited by Mr *Mohd Husain* a question relating to either *zamindari* property or compensation in respect of *zamindari* property was involved The only questions that were raised in those cases were relating to the rights of *bhumidhars* or *sirdars* or *asamis* and this we have already held can be decided by the consolidation authorities It is true that the learned Judges who dealt with those cases have some times used the word title Most probably that word was used because the word title occurred in the Act in connection with *bhumidhari* rights but in those cases the learned Judges were only considering either *bhumidhari* or *sirdari* or *adhivasi* rights Consequently even if they have used the word title, it must be read in the context in which it is used in that case, the context being that they were dealing with the rights of tenure holders only These decisions are therefore clearly distinguishable

For the reasons mentioned above we are of the opinion that the present appeal is not hit by the provisions of s 5 of the Act

We would also like to notice the other submission of Mr *Mohammad Husain* that the plaint not having

been amended, this Court cannot grant any relief in respect of the compensation amount The submission is without substance An appellate court is always entitled to take into consideration any change in law [See *Gummalapura Taggina Matada Kotturuswami* v *Setra Veerayya* (1)] The appellate court has also the power to mould the relief in view of the change in law This can clearly be done under O XLI r 33 C P C It is, therefore, open to us to mould the reliefs so as to suit the changed law and the changed circumstances This objection also therefore has no force

The application is therefore rejected

Application rejected

(1) I R 1954 S C 445

CRIMINAL REVISION

Before Mr Justice Unyal

DES RAJ APPLICANT,

1966

October 18

v

STATE OPPOSITE PARTY

Code of Criminal Procedure, 1898 *s* 195 *Court—Rent Control and Eviction Officer—If a Court under s* 195 *Cr P C—U P (Temporary) Control of Rent and Eviction Act and* 199 *I P C*

The Rent Control and Eviction Officer is only an authority who has been invested with certain powers of a civil court for carrying out the purposes of the Act He exercises quasi judicial powers and is not a court as contemplated by s 195 Cr P C and consequently a complaint by the Rent Control Officer was not required for proceeding under ss 193 and 199 I P C

Criminal Revision No 2097 of 1965 against the order of Madan Mohan Gupta, Additional Civil and Sessions Judge Meerut in Criminal Appeal No 150 of 1965 decided on 8th October 1965

Keshav Sahai for the Applicant

Asif Ansari and *S S Bhatnagar* for the Opposite party

UNYAL J —This application in revision is directed against an order rejecting the objection that the complaint under ss 193 and 199 I P C could not be entertained by the Magistrate as the same had not been preferred by the Rent Control and Eviction Officer before whom the alleged false affidavit was filed

The facts giving rise to the present revision may now be stated One Munna Lal who was the landlord of certain accommodation applied under s 3 of the U P (Temporary) Control of Rent and Eviction Act 1947

(the Act) seeking permission to file a suit to eject his tenant the applicant Des Raj The application under s 3 was contested by the tenant who filed an affidavit before the Rent Control and Eviction Officer making certain statements which disentitled the landlord from seeking permission to eject the tenant The result was that the Rent Control and Eviction Officer rejected the application of the landlord Thereafter the landlord filed a complaint under ss 193 and 199 I P C against the applicant alleging that the latter had made false statements in the affidavit filed before the Rent Control and Eviction Officer The applicant raised a preliminary objection to the maintainability of the complaint and contended that the Magistrate could not take cognizance of the offence inasmuch as the complaint had not been preferred by the court in accordance with the provisions of s 195(1)(*b*) of Cr P C The Magistrate as well as the Sessions Judge overruled the objection and hence the revision

The sole point for consideration is whether the Rent Control and Eviction Officer is a court as contemplated by s 195 Cr P C ? The expression court is not defined in the Criminal Procedure Code S 3 of the Evidence Act defines court as follows

> Court includes all Judges and Magistrates and all persons except arbitrators, legally authorised to take evidence

Ss 19 and 20 of the Penal Code define the terms Judge and Court of Justice as under

> S 19 The word Judge denotes not only every person who is officially designated as a Judge but also every person who is empowered by law to give in any legal proceeding civil or criminal a definitive judgment or a judgment which if not appealed against would be definitive, or a judg

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ment which, if confirmed by some other authority, would be definitive or

> who is one of a body of persons, which body of persons is empowered by law to give such a judgment

S 20 The words Court of Justice denotes a Judge who is empowered by law to act judicially alone or a body of Judges which is empowered by law to act judicially as a body when such Judge or body of Judges is acting judicially

The definition of court given in the Indian Penal Code connotes that unless and until a binding and authoritative judgment can be pronounced by a person or body of persons it cannot be regarded as a court It has however been held that a Tribunal is not necessarily a court in the strict sense of the term even though it is able to pronounce a final judgment In *Harinagar Sugar Mills Ltd* v *Shyam Sunder* (1) it was pointed out that with the growth of civilization and the problems arising from social and economic conditions a large number of administrative tribunals have been empowered to decide disputes between parties and give definitive judgments still such tribunals are not regarded as courts The Supreme Court observed

> 'These tribunals have the authority of law to pronounce upon valuable rights they act in a judicial manner and even on evidence on oath but they are not part of the ordinary Courts of Civil Judicature They share the exercise of the judicial power of the State but they are brought into existence to implement some administrative policy or to determine controversies arising out of some administrative law They are very similar to Courts but are not Courts When the Consti

(1) AIR 1961 SC 1669

tution speaks of Courts in Arts 136, 227 or 228 or Arts 233 to 237 or in the Lists it contemplates Courts of Civil Judicature but not tribunals other than such Courts This is the reason for using both the expression Arts 136 and 227 '

The Supreme Court emphasised the point that

> by Courts is meant Courts of Civil Judicature and by tribunals those bodies of men who are appointed to decide controversies arising under certain special laws Broadly speaking, certain special matters go before tribunals, and the residue goes before the ordinary Courts of Civil Judicature Their procedures may differ, but the functions are not essentially different What distinguishes them has never been successfully established Lord Stamp said that the real distinction is that Courts have an air of detachment But this is more a matter of age and tradition and is not of the essence Many tribunals, in recent years have acquitted themselves so well and with such detachment as to make the test insufficient '

Regarding the definition of court' as given in the Indian Evidence Act the Supreme Court in *Brajnandan Sinha* v *Jyoti Narain* (1) laid down that the definition of court in s 3 Evidence Act is not exhaustive but framed only for the purpose of that Act and is not to be extended where such extension is not warranted

It remains to consider whether the Rent Control and Eviction Officer under the U P Act is an authority invested with quasi judicial powers or is a court in the strict sense of that term A similar question arose in *Bharat Bank* v *Employees of Bharat Bank* (2) In that case the point for consideration was whether a tribunal constituted under the Industrial Disputes

(1) A I R 1956 S C 66 (2) A I R 1950 S C 188

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Act 1947 exercises all or any of the functions of a Court of Justice and, if so whether it is a court in the technical sense of the word After considering a large number of authorities it was held that the Industrial Tribunal was entrusted with the duty of adjudicating a dispute of a peculiar character and it was for this reason that it was armed with extraordinary powers These powers however are derived from the statute The adjudication of the dispute has to be in accordance with evidence legally adduced and the parties have a right to be heard and being represented by a legal practitioner Right to examine and cross examine witnesses has been given to the parties and finally they can address the tribunal when evidence is closed The whole procedure adopted by the Act and the rules is modelled on the Code of Civil Procedure The Industrial Tribunal has therefore all the necessary attributes of a Court of Justice The Supreme Court further emphasised that the exercise of such wide powers by the tribunal did not make them Courts of Justice They may rightly be described as quasi judicial bodies because they are out of the hierarchy of the ordinary judicial system '

In order to see whether a tribunal or authority vested with judicial power is or is not a court we have to examine the provisions of the Act under which the said tribunal or authority has been constituted For this purpose the preamble of the Act its aims and objects and the powers vested under the statute have to be looked into For instance it was provided in s 11(3) of the Industrial Disputes Act 1947 that a tribunal shall have the same powers as are vested in a civil court under the Code of Civil Procedure when trying a suit in respect of the following matters namely—

(a) enforcing the attendance of any person and examining him on oath

(*b*) dealing with production of documents and material exhibits,

(*c*) issuing commissions for the examination of witnesses

Thus the statute itself had made it clear that the Industrial Tribunal was not a Court of Civil Judicature but had been invested with the powers of a civil court for certain purposes From this it follows that it was not a civil court but a tribunal exercising the powers and functions of a civil courts for certain purposes

The same view was expressed in *Virindar Kumar Satyawadi* v *The State of Punjab* (1) That was a case under the Representation of the People Act 1951 the appellant in that case was a candidate for election to the House of the People and had made a declaration on solemn affirmation under r 6 of the Election Rules before the Returning Officer The objection that the declaration was false was rejected by the Returning Officer who accordingly accepted the nomination paper Subsequently the rival candidate filed a complaint before a First Class Magistrate charging the appellant with offences under ss 181 182 and 193 of the Indian Penal Code The appellant raised an objection that the District Magistrate had no jurisdiction to take cognizance of the offences mentioned in the complaint in view of the provisions of s 195(1)(*a*) and (*b*) of the Criminal Procedure Code The point which arose for consideration was whether the Returning Officer was a court as contemplated by the provisions of the Criminal Procedure Code Dealing with this question the Supreme Court observed that the powers entrusted to the Returning Officer are those mentioned in s 36(2) of the Representation of the People Act These powers are undoubtedly judicial

(1) A I R 1956 S C 153

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in character but the Returning Officer is not required to act judicially in discharging them and is not, therefore, a court for the purpose of s 195(1)(*b*)

For the proper understanding of the question posed in this case we may look into certain provisions of the U P Act The preamble of the Act says that it has been enacted to provide for the continuance during a limited period, of powers to control the letting and the rent of residential and non residential accommodation and to prevent the eviction of tenants therefrom S 2(*d*) defines District Magistrate as including an officer authorised by the District Magistrate to perform any of his functions under this Act So that any officer of whatever rank may be authorised by the District Magistrate to perform the functions entrusted to him under the Act, the matter has been left entirely to his discretion S 3 provides that subject to any order passed under sub s (3) no suit shall without the permission of the District Magistrate, be filed in any civil court against a tenant for his eviction from any accommodation, except on one or more of the following grounds

S 7 G(2) provides

> The District Magistrate shall, in so far as such powers are necessary for carrying out the different provisions of this Act, have power to summon and enforce the attendance of witnesses and to compel the production of documents in so far as may be *in the same manner as is provided in the case of a Court under the Code of Civil Procedure*, 1908 '

The provisions laid down in s 7 G(2) above make it abundantly clear that the District Magistrate acting under s 3 *is* not a civil court but has been invested with powers of a civil court for certain purposes It

will be noticed that the provisions of s 7 G(2) are analogous to those of s 11(3) of the Industrial Disputes Act 1947 referred to in *Bharat Bank* v *Employees of Bharat Bank* (1) A reading of the provisions of the U P Act makes it plain that the Rent Control and Eviction Officer is not a court but only an authority who has been invested with certain powers of a civil court for carrying out the purposes of the Act

In *Lala Shri Bhagwan* v *Ram Chand* (2) the point raised before the Supreme Court was whether the Rent Control and Eviction Officer under the U P Act exercises the power of a court or whether he is merely a tribunal exercising judicial functions GAJENDRAGADKAR, C J speaking for the Court said that—

> The right conferred on the tenants not to be evicted except on the specified grounds enumerated by cls (*a*) to (*g*) of s 3(1) is a statutory right of great significance and it is this statutory right of which the tenants would be deprived when the landlord obtains the sanction of the District Magistrate the appropriate authorities have to consider the matter in a quasi judicial manner and are expected to follow the principles of natural justice before reaching their conclusions

It was clearly laid down that the powers exercised by the District Magistrate under the U P Act were quasi judicial powers and that the District Magistrate acting under s 3 is not a court

In *Nageswara Rao* v *Andhra Pradesh State Road Transport Corporation* (3) SUBBA RAO, J (as he then was) delivering the majority judgment of the Court said

> The concept of quasi judicial act implies that the act is not wholly judicial, it describes only a

(1) A I R 1950 S C 188 (2) A I R 1965 S C 1767
(3) A I R 1959 S C 308

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duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its judicial power

It follows that when an authority or tribunal makes an order and the order is of a quasi judicial nature it cannot be regarded as an order made by a court The same view has been expressed in *Jagannath Prasad* v *State of U P* (1)

I am therefore, clearly of opinion that the Rent Control and Eviction Officer is not a court as contemplated by section 195 of the Cr P C and the complaint was rightly entertained by the Magistrate

Learned counsel for the applicant referred to *Bilas Singh* v *Emperor* (2) The point which arose for consideration in that case was whether the Election Commissioners were civil courts within the meaning of s 476 Cr P C SULAIMAN, J expressed the view that the word includes in s 195(2) has a wider connotation than the word means and as such, the Election Commissioners would be covered by the expression court The learned Judge, however, made it clear that it is impossible to hold that the Election Commissioners are a civil court within the meaning of s 476, Cr P C and I must therefore hold that they had no jurisdiction to proceed under that section "

DENIELS, J agreed with SULAIMAN, J that Election Commissioners are not a civil court but he disagreed with him on the interpretation of the word includes in s 195 and said that this word in an enactment is not always of a wider significance than the word means as held by the Privy Council in *Dilworth* v *The Newzealand Commissioners of Stamps* (3) The learned Judge went on to say—

> If the term 'Court in s 195 is really wider than the civil revenue or criminal court in s 476, the

(1) AIR 1963 SC 416 (2) AIR 1925 All 737
(3) 1899 AC 99

urious result follows that whereas the order of the civil revenue or criminal court making or refusing to make a complaint is subject to appeal and to a special procedure prescribed by s 476 a similar order passed by a Court constituted is not subject to any appeal

The above decision if anything goes against the contention raised by the learned counsel that the Election Commissioners are a civil court

Reference was also made to *Bajaj Apajik Kote* v *Emperor* (1) In that case it was held that s 195(1) (*b*) applies if a judicial proceeding is in existence at the time when it is sought to prosecute the offender for an offence mentioned in s 195, Cr P C The view of the Bombay High Court in that case runs counter to the opinion expressed by our own Court in *Emperor* v *Kashi Ram* (2) and *Emperor* v *Prag Dutt*, (3) None of these cases relied upon by the learned counsel are relevant to the point under consideration The matter has been finally settled by the Supreme Court in the case of *Lala Shri Bhagwan* (4) and it has been held that the proceedings before the Rent Control and Eviction Officer under the U P Act are not judicial proceedings in a court but are quasi judicial proceedings before an authority appointed under the Act

I am therefore clearly of the view that the complaint filed by the landlord against the applicant was rightly entertained by the Magistrate The revision accordingly fails and is dismissed

Revision dismissed

(1) A I R 1947 Bom 7
(2) I L R 46 All 906
(3) I L R 51 All 382
(4) A I R 1960 S C 1767

APPELLATE CIVIL

Before Mr Justice Jagdish Sahai and Mr Justice Broome

1966

November 16

RAJENDRA SWARUP SHARMA APPELLANT,

v

THE GENERAL MANAGER NORTHERN EASTERN RAILWAY RESPONDENT

Constitution of India, *Art* 311(2) *Reversion from officiating higher post for unsatisfactory performance—Not a reduction in rank*

Where a government servant is given a chance to officiate on a higher post it is implicit in the promotion that he would be reverted on account of unsatisfactory performance There fore unless the servant had a right to the post he cannot complain that he was deprived of a position to which he was legally entitled Termination of officiating trial chance does not amount to reduction in rank where no right to the post existed In such cases notice for termination is not material

Whether a reversion affects the chances of future promotions is a question to be decided on the facts of each case

Special Appeal no 227 of 1962 from the Judgment and Decree of V G OAK J in Civil Miscellaneous Writ No 2348 of 1959 decided on 1st November 1961

Shanti Bhushan, for the Appellant

The following judgment of the Court was delivered by—

JAGDISH SAHAI, J —This special appeal by Rajendra Swarup Sharma is directed against the judgment of OAK, J dated November 1 1961 dismissing writ petition No 2348 of 1959

Rajendra Swarup Sharma (hereinafter referred to as Sharma) was employed in the North Eastern Railway as a Traffic Inspector in Lower Gazetted Service class III Some posts in Lower Gazetted Service class II

fell vacant Sharma applied for promotion to one of those posts A Selection Board prepared a panel of names Sharma s name was included in it by the Selection Board He was given a chance to work as Assistant Traffic Superintendent in Lower Gazetted Service class II and took over on that post on October 6 1958 However by means of an order dated August 7 1959 he was reverted to his substantive post in Lower Gazetted Service class III In this order no reason was assigned for Sharma s reversion to his substantive post He made a request to the authorities to inform him of the reasons of his reversion whereupon a clarification note was issued on September 15 1959 in which it was stated that Sharma had been reverted on account of his unsatisfactory performance In the writ petition afore said Sharma prayed that the orders dated August 7 1959 and September 15 1959 be quashed

The main submission of the learned counsel for Sri Sharma before OAK, J was that Sharma was entitled to the benefit of Art 311 (2) of the Constitution of India, and inasmuch as no opportunity of showing cause was provided to him before he was reverted to his substantive post there had been an infringement of the provisions of Art 311(2) of the Constitution OAK, J repelled this submission The learned counsel for Sri Sharma also relied upon certain rules The learned Single Judge was however of the opinion that it had not been established that there had been any infringement of those rules He observed as follows

> As discussed above r 10 of Chap II of the Indian Railway Establishment Manual is ambiguous It cannot therefore, be stated that the interpretation placed by the Railway Board is clearly wrong

Mr *Shanti Bhushan*, the learned counsel for the appellant has contended that inasmuch as the appellant s

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RAJENDRA SWARUP SHARMA v. THE GENERAL MANAGER NORTHERN EASTERN RAILWAY

Jagdish Sahai J

reversion was on account of his unsatisfactory performance a blame was attached to him with the result that he was reverted for a fault and for that reason Art 311 (2) of the Constitution of India is applicable He has placed reliance upon *P L Dhingra v Union of India* (1) Before we consider the question as to whether or not *P L Dhingra's* (1) case applies to the facts of the case, we would like to mention the salient facts

Sharma was occupying the post of a Traffic Inspector in the Lower Gazetted Service Class III Clearly he had no right to a post in the Lower Gazetted Service class II Any post in Lower Gazetted Service class II did not fall in the cadre to which Sharma belonged in Lower Gazetted Service class III Consequently he could not claim promotion to Lower Gazetted Service class II as of right and it could not be his normal expectation He was given a chance to officiate on a post in Lower Gazetted Service class II on a trial basis It was implicit in the promotion awarded to him that he would be reverted on account of unsatisfactory performance Since Sharma had no right to a post in Lower Gazetted Service class II he cannot complain that he has been deprived of a position to which he was legally entitled Mr *Shanti Bhushan* contends that the following observation in *Dhingra's* case (1) supports Sharma

> 'Thus if the order entails or provides for the forfeiture of his pay or allowances, or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion then that circumstance may indicate that although in form the Government had purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the

(1) A I R 1955 S C 36

contract of employment or under the rules in truth and reality the Government has terminated the employment as and by way of penalty

The Supreme Court was not dealing with a case like the one before us where a person has only been given a temporary promotion merely on a trial basis Apart from this all that the above passage indicates is that even though an order of reduction in rank may look innocuous, it may in truth and reality be one of reduction in rank In the present case, we have analysed the facts and have come to the conclusion that in truth and reality also the railway authorities did not reduce the appellant in rank They only terminated the officiating trial chance given to Sharma and reverted him from a post, to which he was not entitled to his substantive post Under these circumstances we do not see any application of *Dhingra s* case (1) to the facts before us When their Lordships spoke of the stoppage or postponment of his future chances of promotion they did not have in their mind a case where a person is given only a trial chance and having proved himself unworthy of it is reverted to his substantive post

Mr *Shanti Bhushan* also placed reliance upon *P C Wadhwa* v *Union of India* (2) The facts of that case are very different from the facts before us That was a case of a member of the Indian Police Service and their Lordships spoke of the stoppage or postponement of his vice While doing so their Lordships held that it was the normal expectation and the right of a member of that service to have entry in the senior scale of the service provided there was a vacancy and that no one could be deprived of it except on the ground of either there being no vacancy or of misconduct or of unfitness In the present case Sharma was not in class II Service at all

(1) A I R 1956 S C 98 (2) A I R 1964 S C 428

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RAJENDRA SWARUP SHARMA v. THE GENERAL MANAGER, NORTHERN EASTERN RAILWAY

Jagdish Sahai J

He was only in class III service and there was no rule under which he could enter class II Service as of right That being the position, the case of Wadhwa is clearly distinguishable

Mr *Shanti Bhushan* also placed reliance upon *Dhajadhari Datta* v *Union of India* (1) and *Dineshwar Bhattacharya* v *Chief Commercial Superintendent, Eastern Railway* (2) In the former case a police officer was reverted to a lower rank *inter alia*, on the ground of misconduct It was, therefore, a clear case of punishment being awarded to him for misconduct Apart from the circumstances that the facts of that case are very different from the case before us, that case cannot be treated to be an authority for the proposition that even when a person is given a chance to officiate on a higher post, his reversion to his substantive post would amount to reduction in rank Actually SINHA, J who decided *Dhajadhari Datta's* case (1) has observed to the contrary He says

> Just as a person in an officiating post has no right to the post, similarly he has no right also to be promoted to that post Promotion to a post is done either according to seniority or efficiency If a person has been sent down to his substantive post after officiating in a higher post for any length of time he would in most cases lose some advantages of seniority because in the meantime persons junior to him in his substantive post might have been promoted to higher posts But that in my opinion would be too remote and I do not think that the learned Chief Justice had such a contingency in his mind

In *Dineshwar's* case (2) the impugned order was passed by the General Manager of the Bengal Nagpur Railway

(1) A I R 1958 Cal 546 (2) A I R 1960 Cal 209

who directed that you should be reverted from the L G S to Class III on account of unsuitability and your name should be removed from the panel of Class III staff approved for promotion to the Lower Gazetted Service SINHA, J., who decided this case, unheld the order of the General Manager reverting Dineshwar to his substantive rank but quashed that part of the order which directed the removal of his name from the panel of class III Service The case, therefore, does not fully support the contention of Mr *Shanti Bhushan* and cannot be treated to be an authority for the proposition that the reversion of Sharma to his substantive post was in the nature of punishment and amounted to an order of reduction within the meaning of Art 311 (2) of the Constitution of India

With regard to the contention that the removal of his name from the panel affected his future promotion we would like to point out that no such case was taken in the writ petition or before the learned single Judge Whether or not the appellant's chances for future promotion would be affected is a question of fact, for the determination of which we have no material before us If the appellant's name was the last in the list he can obviously have no cause to complain Before he could succeed in showing that the chances of his future promotion had been affected he had to make allegations of fact showing that the names of several persons who were below him in the list had been promoted before him This had not been done in the present case Consequently, we do not see any applicability of *Dineshwar's* case to the facts before us

Mr *Shanti Bhushan* placed reliance upon r 133(2) of the Railway Establishment Code Volume I That rule reads

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Jagdish Sahai J

Officiating or substantive promotions to class II Service shall be made by the General Managers provided that such promotions are made in the strict order of priority in which the individuals have been placed on the recommendations of Selection Board if any supersession of that order is involved the matter should be referred to the Railway Board

Mr *Shanti Bhushan* contends that once the name of Sharma was in the list he had a right to promotion in the strict order in which his name was entered and if there was to be a change the matter had to be referred to the Railway Board There is no material before us to show whether the matter was or was not referred to the Railway Board The point was not taken in this form either in the writ petition or before the learned single Judge In that view of the matter we are not impressed even with this submission of Mr *Shanti Bhushan*

On enquiry from us Mr *Shanti Bhushan* has stated that the appellant has now already been promoted to Lower Gazetted Service class II His only complaint is that even though he has been so promoted some persons junior to him might now have become his seniors We have already pointed out earlier that there is no material on the record, on the basis of which it could be held or even urged that juniors to the appellant have now become his seniors in Lower Gazetted Service class II Besides in view of his promotion to Lower Gazetted Service class II the only relief that the appellant in substance has asked for is that his seniority in Lower Gazetted Service class II may be readjusted if it has been adversely affected and he should be given a place higher than those who may have been his juniors We have already said that in the first place there is nothing to show that there were any juniors to him in the list

secondly the question relating to the determination of seniority is beyond the scope of the writ petition giving rise to this special appeal In the writ petition the only prayer that was made was that the order reverting the appellant and the one assigning him the reasons for his reversion be quashed Inasmuch as the appellant has now been promoted again his complaint of demotion has disappeared

Strenuous argument was advanced by Mr *Shanti Bhushan* to the effect that in every case where a person is reverted to his substantive post on the ground of unsatisfactory performance it must be held that there has been a reduction in rank So far as the present case is concerned we would like to point out that in the order dated August 7 1959 by which the petitioner has been reverted the reason for his reversion was not mentioned and it was a simple order of reversion It was only because Sharma insisted that he must be told the reasons why he was reverted that the railway administration had to inform him that his reversion was brought about by his unsatisfactory performance As was pointed out by the Supreme Court in *Dhingra's case* (1), it is not the motive for either terminating the services of a Government servant or reducing him that is material determining whether or not it amounts to an order of dismissal or removal of reduction in rank but it is the ground on which a person has either been dismissed or removed or reduced in rank In the present case Sharma was not reduced in rank on any ground of misconduct, though the motive for reverting him to his substantive post was that he had failed in the trial that was given to him and his performance was not satisfactory so as to justify his absorption in Lower Gazetted Service class II

(1) AIR 1958 SC 36

RAJENDRA SWARUP SHARMA v. THE GENERAL MANAGER NORTHERN EASTERN RAILWAY

Jagdish Sahai J.

No other submission has been made before us We are satisfied that there are no merits in this special appeal We therefore dismiss it with costs

Special appeal dismissed

APPELLATE CIVIL

Before Mr Justice Verma and Mr Justice Rajeshwari Prasad

SHIV PRASAD GUPTA AGARWALA — APPELLANT,

v

S M SABIR ZAIDI — RESPONDENT

1968 December 7

Fatal Accidents Act, 1855 *s 1A—Damages—Conditions for the award of—Deceased not earning wages at the time of death—Considerations for and determination of damages in such a case*

The damages that are allowed under the Act are for the loss of the pecuniary benefits which the plaintiff would have got from the deceased if the latter had not died In estimating the loss the age of the deceased his expectation of life the condition of his health his habits etc are relevant considerations for ascertaining his earning capacity Damages by way of *solatium* is however not contemplated

It is not a condition precedent for the award of damages that the deceased should have been earning an income on the date of death Nor need there be specific evidence of pecuniary advantage actually derived even prospective loss can be taken into account

Thus the *quantum* of damages circumstances of family deceased's position in the family his mental and physical equipment his age as well as the age of the claimant, standard of living of the family are the necessary considerations

First Appeal No 241 of 1955 against the Judgment and decree of R A QURESHI, Additional Civil Judge Muzaffarnagar in suit No 45 of 1958 decided on 2nd April 1955

B S Darbari, for the Appellant

M A Kazmi, for the Respondent

The following judgment of the court was delivered by—

R PRASAD, J —This is a plaintiff's first appeal directed against the judgment and decree of the Additional

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Rajeshwari Prasad J.

Civil Judge Muzaffarnagar, dated 2nd April 1955 in Suit no 45 of 1953

The plaintiff filed this suit for recovery of a sum of Rs 20,000 from the defendant with costs of the suit on the facts disclosed in the plaint The plaintiff alleged that the defendant respondent carried on business of running contract carriage buses and that in that connection he owned Chevrolette Public Stage Carriage Bus USL1818 which used to run between Muzaffarnagar and Bhopa and to carry passengers The bus was insured against third party risk with some Insurance Company The plaintiff himself was an Assistant Engineer (Tube well Division) and belonged to respectable family Plaintiff's elder brother Janki Prasad was a retired Executive Engineer, Public Works Department Uttar Pradesh, and one of the sons of the plaintiff, Sri Chandra Mohan Gupta was a Lieutenant in the Army, having Commissioned Rank Shri Jag Mohan Gupta aged about 18 years was one of the sons of the plaintiff, and at the relevant time, he was a student of the IInd Year, D A V College, Muzaffarnagar According to the plaintiff he was brilliant and promising and possessed good physique Consequently, plaintiff entertained high hopes from him On the 3rd October 1952, Sri Jag Mohan Gupta was going in a rickshaw to a place known as New Mandi, Muzaffarnagar from the Railway Station He had crossed the Bhopa Railway crossing at Muzaffarnagar The rickshaw driver had stopped the rickshaw in front of the cycle repair shop of Sri Munshi Lal about 100 paces away from the Railway crossing towards Bhopa side The rickshaw was on the *kuchacha* portion of the land in front of the aforesaid shop about twenty feet away from the *pucca* Gola of the road The rickshaw driver was getting down from his rickshaw to get rickshaw wheels inflat-

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Rajeshwari Prasad J

ed Shri Jagmohan Gupta remained sitting thereon At that moment the above noted passenger bus driven by Zahoor Ahmad driver came from Bhopa side with passengers, but without using the horn, it came rashly on the wrong side, namely, on the right side on the *kuchcha* portion of the road In this process, the rick shaw was so violently struck that the rickshaw driver fell down to his left and got hurt while Jag Mohan fell towards his back side His head got crushed by the said bus and he died instantaneously The death of the deceased was, therefore, brought about by gross negligence of the defendant s servant for which the defendant was liable It was also alleged that the bus was not in a perfect order The brakes both foot and hand were not functioning The condition of the bus therefore also subscribed the incident

Criminal proceedings had to be shelved on account of the fact that the driver absconded and went to Pakistan

The plaintiff and his family were greatly shocked by the death of Jag Mohan The plaintiff had very great love and affection for him and he was very obedient to the members of the family The plaintiff was deprived of the affection and services of the deceased and had suffered loss Although a sum of Rs 20 000 would not be adequate compensation, the plaintiff contents himself by claiming damages to that extent

Defendant filed a written statement to contest the suit His case was that the death of Sri Jagmohan Gupta was not caused on account of any negligence act of the defendant or his driver Nor was the bus in a defective condition The driver was running the bus at a low speed when the rickshaw running at a high speed reached near the bus and that there was a bullock-cart also in front of the bus on the side of the Railway crossing on the main road With a view to avert an acci

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dent, the driver of the bus diverted it from the left to the right side and at that moment the rickshaw appeared from behind the bullock cart suddenly This was how the accident took place It was alleged that the death was caused on account of the negligence of the rickshaw driver himself It was further averred that the Insurance Company was a necessary party to the suit The defendant in any case was not liable to pay damages but if the plaintiff could claim any it was from Zahoor Ahmad the driver or from the Insurance Company It was also said that the damages claimed by the plaintiff were excessive and that the suit was liable to be dismissed

Necessary issues were framed by the court below and the material findings returned by that court are that the suit was not bad for non joinder of the Insurance Company, and that the defendant was liable to pay damages on account of the negligent conduct of his driver Zahoor Ahmad The court further came to the conclusion that the accident took place while rickshaw of the plaintiff's son stopped in front of Munshi Ram's shop and not in the manner as alleged by the defendant It was also found that the driver was guilty of negligence and rash driving After recording all these findings in favour of the plaintiff the court below considered certain circumstances and some case law and came to the conclusion that the plaintiff was not entitled in law to any damages As a result of the last finding, court below dismissed the plaintiff's suit in its entirety

We have gone through the reasoning accepted by the court below in deciding the various issues in favour of the plaintiff, and there does not appear to be any valid reason for interfering with those findings We, therefore, confirm the findings of the court below recorded in favour of the plaintiff

So far as the finding of the trial court on the question of damages is concerned, we are of the view that the court below fell into error in coming to the conclusion that the plaintiff was not entitled to any damages at all

The suit has been filed under s 1 A of the Fatal Accidents Act Under this Act, the Court has been given a discretion to allow such damages as it thinks proportionate to the loss resulting from such death to the parties for whom and for whose benefit such action has been brought The court has to determine the pecuniary loss resulting from the death to the parties beneficially entitled The damages that are allowed under such a claim are for the loss of the pecuniary benefits, which the plaintiff would have got from the deceased, if the latter had not died In estimating such loss the age of the deceased his expectation of life the consideration of his health, his habits and other matters which go to show his earning capacity, have to be considered Sympathetic damages by way of *solatium* cannot be allowed The assessment of damages in such a case must necessarily be rough and approximate and the investigation has to be more or less a guess work

It appears that for sometime the notion was that no damages could be awarded in case, where the deceased was not shown to have been earning wages at the time of his death By decisions both under the English and Indian Law that notion was dispelled and the view which appears to be settled now is that in order to entitle the plaintiff to damages on account of the death of his relation, it is not necessary that the deceased should have been an earning member on the date of his death

Charlesworth in his well known book on Negligence Third Edition at page 559, states—

> "It is not necessary that the deceased should have been actually earning wages at the death, if

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there is a reasonable expectation that wages will be earned in the future, with the result that financial benefit will accrue to the dependents

The fact of past contribution may be important in strengthening the probability of future pecuniary advantage but it cannot be a condition precedent to the existence of such a probability

The provision of Indian Fatal Accidents Act in India are similar to those of the Fatal Accidents Act, 1846 (9 and 10 Vict c 93) of England popularly known as Lord Campbell's Act In the case of *Taff Vale Railway* v *Jenkins* (1) it was observed

> It is not a condition precedent to the maintenance of an action under the Fatal Accidents Act 1846, that the deceased should have been actually earning money or money's worth or contributing to the support of the plaintiff at or before the date of the death provided that the plaintiff had a reasonable expectation of pecuniary benefit from the continuance of the life"

In the above authority, Viscount Haldane Lord Chancellor also observed

> 'The basis is not what has been called *solatium*, that is to say, damages given for injured feelings or on the ground of sentiment but damages based on compensation for a pecuniary loss But then loss may be prospective and it is quite clear that prospective loss may be taken into account It has been said that this is qualified by the proposition that the child must be shewn to have been earning something before any damages can be assessed I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable nor do I think it is really established by the authorities when you examine them"

(1) 1913 A C p 1

In the case of *Hira Lal* v *State of Punjab* (1) the view taken was that in order to succeed in such an action it was not necessary for the plaintiff to prove that the deceased was actually earning some income, the whole or part of which was spent towards the maintenance or support of his parent There has not to be specific evidence of pecuniary advantage actually derived from the deceased prior to his death Under this Act, even prospective loss can be taken into account Parents can legitimately recover for the loss of the probability that their son would some day earn and contribute towards their maintenance

Applying these principles to the facts of the present case the question of damages has to be fixed by considering the circumstances of the family the position which the deceased occupied in his family, the mental and physical equipment of the deceased his age also the age of the plaintiff and the standard of living of the particular family It is not in dispute that the deceased was about 18 years of age, and that there was nothing particularly wrong with his health He was a student of Intermediate class and one of the subjects offered by him was Biology The evidence disclosed that it was proposed to send the deceased into medical profession Court below has given undue attention to the question whether the boy was really a brilliant student That is only a matter of degrees So far as the standard of the family of the plaintiff is concerned it appears that the plaintiff himself was an Engineer and in Government service One of his sons was in the Army as a Lieutenant and other members of his family were also well-employed and fairly educated There is no reason to doubt why the deceased would not have been brought up and educated on the same standard On a consideration of the relevant circumstances, we are of the opinion that the deceased had a

(1) A I R 1961 Pun 286

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fair prospect in life and would certainly have made himself useful to the family If the proposal about his studies and going into the medical profession had gone as scheduled it would be fair to expect that he would have earned at least Rs 300 or R 400 per month

In fixing damages, we are not oblivious of the fact that it would have been necessary for the plaintiff to incur expenditure on the further studies of the deceased till he was duly qualified Nor are we oblivious of the fact that within a course of few years, the deceased would have been married and then he would have to support his own family out of his earnings After taking notice of the aforesaid considerations we have come to the conclusion that in due course the deceased would have started contributing a sum of Rs 100 per month to his father's fund The plaintiff was about 53 years of age when the death of his son took place and relying on the average Indian span of life plaintiff would be expected to be alive up to the age of 70 years The deceased himself was 18 years of age when his death took place and he would have started earning from the age of 25 years The age of the plaintiff would have been 60 years by the time the deceased attained the age of 25 years The plaintiff would therefore have obtained pecuniary assistance from the deceased at the rate of Rs 100 per month for a period of ten years By the death of his son, the plaintiff has been deprived of the prospect of getting pecuniary assistance at the rate of Rs 100 per month for a period of ten years The total amount of damages therefore to which the plaintiff can be entitled must be fixed at Rs 12 000

We allow the appeal set aside the decision of the court below and decree the plaintiff's suit for recovery of Rs 12,000 only with proportionate costs against the person and property of the defendant The rest of the plaintiff's claim is dismissed

Ordered accordingly

CRIMINAL REVISION

*Before Mr Justice R A Misra**

BHONDOO AND OTHERS — APPLICANTS,

v

STATE — OPP PARTY

1966

December 5

Prevention of Cow Slaughter Act, 1955 (*Act I of* 1956)—*Ss 3 and 8—s 3—Word 'Slaughter' Meaning of*

The word slaughter in s 3 of Prevention of Cow Slaughter Act 1955 does not mean merely killing or finishing life in the animal It also covers the numerous incidental and necessary process for turning it into a state in which it can be used for purposes of food These necessary processes in the case of a killed animal are skinning the dead body dismembering its parts from the body and cutting the body into smaller pieces for being cooked

Criminal Revision No 349 of 1965 against the order dated August 31 1965 passed in Crl Appeal No 7 of 1965 by Sri O P Mehrotra II Additional Sessions Judge Unnao

The facts appear in the judgment

Kalbe Abbas Counsel for the Applicant

T N Verma Counsel for the State

MISRA, J —In this revision petition I have heard Sri *Kalbe Abbas* learned counsel for the applicants and the learned Assistant Government Advocate I have also closely perused the record

In my opinion none of the four grounds on which the revision petition is sought to be supported is effective and therefore it must fail

Firstly, it is argued that the statements of the eye witnesses namely Ahmad Khan (P W 1) Kallo (P W

* While sitting at Lucknow

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2) Yaqub Khan (P W 3) Sankatha Prasad Head Constable (P W 4) and Bhagwati (P W 5) suffer from material contradictions and the first three witnesses are proved to be inimical to the applicants and therefore their evidence should not be believed The learned counsel for the applicants has invited my attention to one or two minor discrepancies in their statements

I have considered them and they are, in my opinion too flimsy to doubt their evidence Further both the lower Courts have held the statements of these eye witnesses to be reliable and I am not satisfied that this concurrent finding of fact of the lower Courts is either unreasonable or perverse to call for an interference by this Court in revision

Then, it was argued that the statements of the eye witnesses are in conflict with the evidence of Dr R P Singh who performed post mortem examination on the body of the cow and therefore, they should be rejected This argument also in my opinion is without any substance No doubt according to the statement of Dr R P Singh the cow in question was slaughtered at about 9 a m on the date of occurrence but according to the evidence of the eye witnesses, they discovered it being slaughtered on the same day before 7 a m The seeming discrepancy between the statements of Dr R P Singh and the eye witnesses has been satisfactorily explained by the evidence of Dr Ramayan Pandey, Master of Veterinary Science and Lecturer in the Department of Medicine Veterinary College, Mathura, who stated that it is not possible for any doctor to be exact about the duration of death and that there is always a margin of error of one or two hours either way in it He opined that the cow in question could have been slaughtered before 7 a m also I have no reason to disagree with the opinion of the appellate Court that there is no conflict between the statements of the eye witnesses and

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the medical evidence and the argument against it should be rejected

Thirdly the learned counsel for the applicants argued that even accepting the statements of the eye witnesses to be true they did not see the cow being killed by any applicant and since her dead body was lying inside the house of Rasool Bux who escaped from the spot the possibility that she was killed by Rasool Bux cannot be excluded and therefore the conviction of the applicants for the contravention of s 3 read with s 8 of the Prevention of Cow Slaughter Act is not maintainable In my opinion this argument is based on a misconception of the true meaning of the word slaughter as used in s 3 of the Prevention of Cow Slaughter Act The word slaughter does not connote only killing as contended by the learned counsel but it means something more In Webster's New Twentieth Century Dictionary amongst others one of the meanings of the word slaughter is the killing of an animal for food Thus the word slaughter does not mean merely killing or finishing life in the animal It also covers the numerous incidental and necessary processes for turning it into a state in which it can be used for purposes of food These necessary processes in the case of a killed animal are skinning the dead body dismembering its parts from the body and cutting the body into smaller pieces for being cooked

In the present case the statements of the eye witnesses conclusively prove that when the police party entered inside the house of Rasool Bux through the door of the room situated towards the south and into the Baotha they heard some Khat Khat sound and they rushed towards the direction wherefrom the sound was coming On reaching the Baotha they saw a killed cow lying there Applicants Ahmad Husain and Bhondu were skinning the dead body Subrati and

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Rasool Bux were cutting flesh from the dead body and Matin Mohd, Sarwar and Aladin were also stooping over the dead body of the cow and were also cutting pieces of flesh Rasool Bux slipped out from the house but the rest were apprehended at the spot Besides that their evidence also proves that four Choors (knives), two Bugdas one axe a block of wood scales and weights consisting of a seer, half a seer quarter seer and another piece of iron weight, were found lying near the dead body of the cow Lastly their evidence proves that all these articles including the head horns legs of the cow, some flesh and liver of the cow weighing about 10 seers were taken into possession by the police It is also too well known that Muslims do not eat the meat of an animal which has died a natural death The applicants are admittedly all Muslims This circumstance, therefore conclusively supports the inference that the cow was killed by them

The medical evidence further proves that the cow was killed near about the time when the raid party entered inside the house of Rasool Bux and saw the accused performing the various acts of skinning and cutting parts of her dead body detailed out above to make it fit for being used as food I therefore see no force in the argument that because there is lack of proof as to which of the applicants or Rasool Bux had actually killed the cow the applicants cannot be held guilty of slaughtering her

Lastly the learned counsel submitted that the sentence imposed upon the applicant is severe and it should be reduced The quantum of sentence which should be imposed upon an accused in the circumstances of a particular case is always in the discretion of the trial Court and unless it can be shown that it has been exercised in an improper and injudicious manner it should not be interfered with in appeal and much less in the exercise of the revisional powers by the High Court.

The trial Court has given satisfactory reasons to support the sentence which he has imposed upon the applicants The learned Additional Sessions Judge, Unnao, has also considered this matter and has observed, 'that the sentence inflicted upon the applicants cannot be said to be severe to justify any interference by him' I am not satisfied that the view of the lower Courts on the question of sentence which has been imposed upon the applicants is either improper or injudicious to call for an interference by me

For the reasons given above, I find no force in this revision petition and dismiss it The applicants are on bail They shall surrender forthwith to serve out the sentence The learned Additional District Magistrate (Judicial), Unnao is directed to issue warrants for the arrest of the applicants and to commit them to jail custody to serve out the sentence when they are arrested or if they surrender by themselves He will report compliance of this order to this Court within six weeks of its receipt in his Court.

Revision dismissed

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Subba Rao, Chief Justice, and Mr Justice Shelat

1967

February 6

BISHWANATH AND ANOTHER APPELLANTS,

v

THAKUR RADHA BALLABHJI AND OTHERS RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Code of Civil Procedure, *(Act V of)* **1908,** *s* **92***—Debutter property—Invalid sale by Shebait—Suit by a worshipper for recovery of property sold,—Whether maintainable*

Where the Shebait or manager is acting adversely to the interest of the temple a worshipper is competent to represent and sue on behalf of the deity for the recovery of the possession of immovable property of the temple from the transferee under an invalid sale on account of its being without necessity or any benefit. Such a suit is not covered or barred as such by the provisions of the Code of Civil Procedure

Decisions to the contrary in *Kunj Behari Chandra* v *Sri Sri Shyam Chand Thakur* (1) and *Artatran Alekhagada* v *Sudersan Mohapatra* (2) holding that the only remedy of the public in such cases lay in a suit under s 92 for the removal of the Shebait and appointment of another who would file the necessary suit over ruled.

Case-law discussed

Civil Appeal No 780 of 1964 from the Judgment and Decree dated the 21st December, 1959 of the Allahabad High Court in First Appeal No 87 of 1948

M S Gupta, Lalit Kumar and *S N Verma,* for the appellants

(1) A I.R. 1939 Pat. 804 (2) A I R 1964 Orissa 11.

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BISHWANATH

THAKUR RADHA BALLABHJI

J P Goyal and *Raghunath Singh*, for the Respondent No 1

The following judgment of the Court was delivered by—

SUBBARAO C J —This appeal by certificate is preferred against the decree of the High Court of Judicature at Allahabad decreeing the suit filed by the respondents for possession of the plaint schedule property

Shri Thakur Radhaballabhji, the deity, represented by Yasodanandan as next friend filed o s No 61 of 1946 in the Court of the 2nd Civil Judge Kanpur against the appellants for a declaration that the deity was the proprietor of house No 49/54 situate in Ban Bazar in the city of Kanpur for possession thereof and for mesne profits The case of the plaintiff (1st respondent herein) was that Lala Jagan Prasad the 2nd defendant to the suit was the manager and Sarbarakar of the deity that the said manager executed a sale deed dated 15th January 1942 conveying the said property to one Lala Behari Lal the 1st defendant to the suit for a consideration of Rs 10,000 and that the sale, not being for necessity or for the benefit of the idol was not binding on the deity It was further alleged that as the 2nd defendant had taken no steps to recover the property, in order to safeguard the rights of the idol the suit was filed through Jagan Prasad who was one of the devotees and worshippers of the deity and who had been taking keen interest in the management of the temple where the deity is installed To that suit the alience was made the 1st defendant and the manager, the 2nd defendant

The 1st defendant set up the case that the suit property did not constitute the property of the idol but was the property of the 2nd defendant purchased by him out of his own funds He further alleged that the suit

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Subba Rao C J

house was in a dilapidated condition, that its rebuilding would involve the idol in heavy and unprofitable expenditure that therefore, the second defendant as its manager acting as a prudent man, sold the same for a good price to the 1st defendant and that as the sale transaction was for the benefit of the idol it would be binding on the plaintiff He also questioned the right of Yasodanandan to represent the idol and to bring the suit on its behalf Both the learned 2nd Civil Judge, Kanpur in the first instance, and on appeal the High Court concurrently held that the sale was not for the benefit of the deity and that the consideration was not adequate They also held that in the circumstances of the case the idol had the right to file the suit represented by Yasodanandan who was a worshipper of the deity and was helping the second defendant in the management of the temple In the result the trial court gave a decree for possession and for recovery of Rs 1 400 as past mesne profits against the 1st defendant on condition that the plaintiff returned a sum of Rs 10 000 to the 1st defendant within two months from the date of the decree and also that the plaintiff would be entitled to future mesne profits at Rs 45 per mensem till the date of delivery of possession of the property The High Court confirmed the same Hence the present appeal

Mr *M S Gupta* learned counsel for the appellant, canvassed the correctness of the findings of both the Courts on the questions of fact as well as of law On the questions of fact namely whether the impugned transaction was binding on the idol and was supported by consideration, we do not think we would be justified to permit the appellant to question their correctness, because the said findings are concurrent and are based upon appreciation of the relevant evidence We accept the said findings

The only outstanding question therefore is whether the suit is maintainable by the idol represented by

Yasodanandan who is a worshipper as well as a person who had been assisting the 2nd defendant in the management of the temple

Two obstacles are raised against the maintainability of the suit, namely, (1) s 92 of the Code of Civil Procedure is a bar to the maintainability of the suit, and (2) a suit for possession of the property of the idol after setting aside the alienation could only be filed by the Shebait and none else could represent the deity

It is settled law that to invoke s 92 of the Code of Civil Procedure 3 conditions have to be satisfied namely (i) the trust is created for public purposes of a charitable or religious nature (ii) there was a breach of trust or a direction of court is necessary in the administration of such a trust and (iii) the relief claimed is one or other of the reliefs enumerated therein If any of the 3 conditions is not satisfied the suit falls outside the scope of the said section A suit by an idol for a declaration of its title to property and for possession of the same from the defendant who is in possession thereof under a void alienation is not one of the reliefs found in s 92 of the Code of Civil Procedure That a suit for declaration that a property belongs to a trust is held to fall outside the scope of s 92 of the Code of Civil Procedure by the Privy Council in *Abdur Rahim* v *Barkat Ali* (1) and by this Court in *Mahant Pragdasji Guru Bhagwandasji* v *Patel Ishwarlalbhai Narsibhai* (2) on the ground that a relief for declaration is not one of the reliefs enumerated in s 92 of the Code of Civil Procedure So too for the same reason a suit for a declaration that certain properties belong to a trust and for possession thereof from the alienee has also been held to be not covered by the provisions of s 92 of the Code of Civil Procedure See *Mukhda Mannudas Bairagi* v *Chagan Kisan Bhawasa* (3) Other

(1) (1928) L R 55 I A 96 (2) (1939) S C R 518
(3) I L R 1937 Bom 809

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decisions have reached the same result on a different ground, namely that such a suit is one for the enforcement of a private right It was held that a suit by an idol as a juristic person against persons who interfered unlawfully with the property of the idol was a suit for enforcement of its private right and was, therefore not a suit to which s 92 of the Code of Civil Procedure applied See *Darshan Lal v Shibji Maharaj Birajman* (1) and *Madhavrao Anandrao Raste v Shri Omkareshvar Ghat* (2) The present suit is filed by the idol for possession of its property from the person who is in illegal possession thereof and therefore it is a suit by the idol to enforce its private right The suit also is for a declaration of the plaintiff s title and for possession thereof and is therefore not a suit for one of the reliefs mentioned in s 92 of the Code of Civil Procedure In either view this is a suit outside the purview of s 92 of the said Code and therefore the said section is not a bar to its maintainability

The second question turns upon the right of a worshipper to represent an idol when the Shebait or manager of the temple is acting adversely to its interest Ganapathi Iyer in his valuable treatise on Hindu and Mahomedan Endowments 2nd edn, at p 226 had this to say in regard to the legal status of an idol in Hindu law

> The ascription of a legal personality to the deity supposed to be residing in the image meets with all practical purposes The deity can be said to possess property only in an ideal sense and the theory is, therefore, not complete unless that legal personality is linked to a natural person

It would be futile to discuss at this stage the various decisions which considered the relationship between the idol and its Shebait or manager *qua* the management of

(1) (1922) I L R 45 All 915 (2) (1936) 21 Bom I R 198

its property as the Privy Council in *Maharaja Jagadindra Nath Roy Bahadur* v *Rani Hemanta Kumari Devi* (1) has settled the legal position and stated thus

> There is no doubt that an idol may be regarded as a juridical person capable as such of holding property though it is only in an ideal sense that property is so held

Dealing with the position of the Shebait of such an idol, the Privy Council proceeded to state

> it still remains that the possession and management of the dedicated property belong to the Shebait And this carries with it the right to bring whatever suits are necessary for the protection of the property Every such right of suit is vested in the shebait, not in the idol

This was a case where the Shebait filed a suit for eviction from the dedicated property within three years after attaining majority and the Board held that, as he had the right to bring the suit for the protection of the dedicated property, s 7 of the Limitation Act 1877, would apply to him The present question namely if a Shebait acts adversely to the interests of the idol whether the idol represented by a worshipper can maintain a suit for eviction, did not arise for consideration in that case That question falls to be decided on different considerations

Three legal concepts are well settled (1) An idol of a Hindu temple is a juridical person, (2) when there is a Shebait, ordinarily no person other than the Shebait can represent the idol, and (3) worshippers of an idol are its beneficiaries though only in a spiritual sense It has also been held that persons who go in only for the purpose of devotion have, according to Hindu law and

(1) (1904) L R 31 I A 203 209 210

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religion a greater and deeper interest in temples than mere servants who serve there for some pecuniary advantage see *Kalyana Venkataramana Ayyangar* v *Kasturi Ranga Ayyangar* (1) In the present case, the plaintiff is not only a mere worshipper but is found to have been assisting the 2nd defendant in the management of the temple

The question is can such a person represent the idol when the Shebait acts adversely to its interest and fails to take action to safeguard its interest On principle we do not see any justification for denying such a right to the wroshipper An idol is in the position of a minor when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an *ad hoc* power of representation to protect its interest It is a pragmatic yet a legal solution to a difficult situation Should it be held that a Shebait who transferred the property can only bring a suit for recovery, in most of the cases it will be an indirect approval of the dereliction of the Shebait's duty for more often than not he will not admit his default and take steps to recover the property, apart from other technical pleas that may be open to the transferee in a suit Should it be held that a worshipper can file only a suit for the removal of a Shebait and for the appointment of another in order to enable him to take steps to recover the property such a procedure will be rather a prolonged and a complicated one and the interest of the idol may irreparably suffer That is why decisions have permitted a worshipper in such circumstances to represent the idol and to recover the property for the idol It has been held in a number of decisions that worshippers may file a suit praying for possession of a property on behalf of an endowment see *Radhabai Kom Chimnaji Salt* v *Chimnaji Bin Ramji* (2) *Zafar*

(1) (1916) I L R 40 Mad 219 226 (2) (1878) I L R 3 Bom 97

Nabi Ali v *Bakhtawar Singh* (1) *Chidambaranatha Thambiran* alias *Sivagnana Desika Gnanasambanda Pandara Sannadhi* v *P S Nallaswa* (2) *Mudalias, Dasondhav* v *Muhammad Abu Nasar* (3) *Kalavana Venkataramana Aiyangar* v *Kasturi Ranga Aiyangar* (4) *Sri Radha Krishnaji* v *Rameshwar Prashad Singh* (5) *Manmohan Haldar* v *Dibbendo Prosad Roy Choudhury* (6)

There are two decisions of the Privy Council namely, *Pramatha Nath Mullick* v *Pradyumna Kumar Mullick* (7) *and Kanhaiya Lal* v *Hamid Ali* (8) wherein the Board remanded the case to the High Court in order that the High Court might appoint a disinterested person to represent the idol No doubt in both the cases no question of any deity filing a suit for its protection arose but the decisions are authorities for the position that apart from a Shebait, certain circumstances, the idol can be represented by disinterested persons B K Mukherjea in his book The Hindu Law of Religious and Charitable Trust 2nd Edn summarizes the legal position by way of the following propositions among others at p 249

(1) An idol is a juristic person in whom the title to the properties of the endowment vests But it is only in an ideal sense that the idol is the owner It has to act through human agency and that agent is the Shebait who is in law the person entitled to take proceedings on its behalf The personality of the idol might therefore be said to be merged in that of the Shebait

(2) Where however the Shebait refuses to act for the idol or where the suit is to challenge the act of the Shebait himself as prejudicial to the interests

(1) (1888) I L R 5 All 497
(2) (1917) 6 Law Weekly 606
(3) (1911) I L R 2 All 660 664
(4) A I R 1931 Mad 112
(5) A I R 1934 Pat 584
(6) A I R 1942 Cal 199
(7) (1925) I R 52 I A 245
(8) (1938) L R 65 I A 268

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of the idol, then there must be some other agency which must have the right to act for the idol. The law accordingly recognises a right in persons interested in the endowment to take proceedings on behalf of the idol.

This view is justified by reason as well by decisions.

Two cases have been cited before us which took a contrary view. In *Kunj Behari Chandra v. Sri Sri Shyam Chand Thakur* (1) it was held by AGARWALA, J. that in the case of a public endowment a part of the trust property which had been alienated by the Shebait or lost in consequence of his action could be recovered only in a suit instituted by a Shebait. The only remedy which the members of the public have where the property had been alienated by a person who was a shebait for the time being was to secure the removal of the shebait by proceedings under s. 92 of the Code of Civil Procedure and then to secure the appointment of another shebait who would then have authority to represent the idol in a suit to recover the idol's properties. So too a Division Bench of the Orissa High Court in *Attaman Mehagau Brahma v. Sudersan Mohapatra* (2) came to the same conclusion. For the reasons given above with great respect we hold that the said two decisions do not represent the correct law on the subject.

In the result agreeing with the High Court we hold that the suit filed by the idol represented by a worshipper in the circumstances of the case is maintainable. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) A.I.R. 1938 Pat. 301 (2) A.I.R. 1954 Orissa 11

CIVIL MISCELLANEOUS

Before Mr Justice S Chandra

FARZAND PETITIONER

v

MOHAN SINGH AND OTHERS OPPOSITE PARTIES

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February 20

U P Civil Service (Judicial Branch) **Rules** 1951 *rr* 21 *and* 32—*Constitution of India Arts* 233 *and* 237—*Rules of Court* 1952 *Ch III—Appointment of Munsif and the rules for the same whether void and ineffective*

There is nothing in law or the facts made out in this case to sustain the objection that the U P Civil Services (Judicial Branch) Rules 1951 and as such the appointment of a Munsif thereunder or his promotion as a Civil Judge were void and ineffective the position regarding diverse objections raised in that behalf being (i) that the initial burden in a writ of *quo warranto* to establish the alleged invalidity or usurpation of office lay on the petitioner (ii) that the High Court for the purposes of Arts 233 to 237 of the Constitution does not mean the whole court and even if it were so it can not be held that the whole High Court was not consulted (iii) that the impugned rules being in respect of matters provided for both by Art 234 and Art 309 of the Constitution are valid because the power under both the Articles will concur to sustain their validity notwithstanding the non mention therein of Art 234 (iv) that the Public Service Commission was in fact consulted (v) that Art 234 is not amenable to the construction that the requisite consultation has to be made for making the rules as well as for each individual appointment In so far as the objection in this behalf rests on the provision of r 21 it is saved by r 32(2) (vi) that there was nothing to substantiate the objection that the promotion of the Munsif to the post of Civil Judge was not made by the High Court

Civil Miscellaneous Writ No 3691 of 1966

Sant Prakash for the Petitioner

Krishna Swarup and S C for the Opposite parties

CHANDRA, J —This petition under Art 226 of the Constitution seeks an information in the nature of *quo warranto* requiring Sri MOHAN SINGH, Munsif Banda,

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the first respondent to show cause by what authority he is holding the office of Munsif

The petitioner is one of the defendants to a suit for specific performance of a contract of sale instituted by respondent nos. 2 and 3 against the petitioner who is alleged to be a subsequent purchaser and respondent no. 4 the vendor. The suit was filed on 6th of August, 1960 and is pending before Sri Mohan Singh Munsif the first respondent. Sri Mohan Singh was appointed as a temporary Munsif on 1st March 1961 under the U. P. Civil Service (Judicial Branch) Rules, 1951. The petitioner challenges the constitutional validity of these rules. It is urged that the rules being in violation of the mandatory provisions of the constitution are void and of no legal effect and appointments made thereunder to the Judicial Service of the State are illegal. The validity of the rules was challenged on the following grounds:

(1) That the rules had not been framed after consultation with the High Court as required by Art. 234 of the Constitution.

(2) That the rules with respect to appointments to the Judicial Service can only be made under Art. 234 of the Constitution and the impugned rules having been expressed to have been made under Art. 309 of the Constitution are invalid.

(3) That consultation to be valid ought to have been done after Art. 234 came into existence any prior consultation is of no legal efficacy.

(4) That the public Service Commission was not consulted prior to the framing of the rules.

(5) That on a true interpretation Art. 234 requires consultation with the High Court for each appointment and not for making the rules and the respondents appointment violated this condition.

The State of Uttar Pradesh has in its counter affidavit repelled the statements of facts in the petition in relation to these contentions It was stated that the rules were framed after due consultation with the High Court and the Public Service Commission It was also urged that the rules were valid notwithstanding that they did not mention that they have been framed under Art 234 of the Constitution

Before dealing with the various submissions on their merits, it may be observed that the learned counsel for the petitioner was not right in arguing the case on the basis that the entire burden to establish the validity of his appointment lay on the shoulders of the respondents The true legal position is that in a *quo warranto* proceeding the petitioner has to establish the claimed invalidity and then alone can the respondents be required to answer the grounds made by the petitioner

In Halsbury s Law of England 3rd Edition Vol II page 152 para 289 it is stated that it is not enough to state in the affidavit supporting the application that the respondent is not entitled to the office for the objections to the respondent s title are not thereby specified The applicant (the incumbent) cannot be called upon to show generally the validity of his election for the onus is upon the applicant to show a disqualification in the respondent *In Rex* v *Jefferson* (1) it was alleged that a large proportion of the votes cast were bad but it was not shown for whom the bad votes were given In this state of affairs the relief was refused It is therefore evident that the petitioner has to establish the disqualification or the invalidity in the occupation of the office by the respondent before the respondent can be called upon

The first submission of the learned counsel was that the U P Civil Service (Judicial Branch) Rules 1951,

(1) (1839) 5 B and Ad 852

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violate the mandatory directives of Art 234 of the Constitution Learned counsel urged that the rules can be framed only after consultation with the High Court which means consultation with all the Judges of the High Court in fact all the Judges were not consulted and the alleged consultation was of no value It was also urged that the consultation within the meaning of Art 234 can only be at a meeting or conference of the Judges of the High Court and not by the process of circulation of the subject matter to the Judges individually

For the first question that consultation with the High Court means consultation with the full Court and not a committee thereof reliance has been placed by the learned counsel for the petitioner on the decision of Rajasthan High Court in *Prem Nath* v *State of Rajasthan* (1) In this case a Bench of the Rajasthan High Court held that consultation with the High Court under Art 233 means consultation with the full Court and not with a committee consisting of the Chief Justice and a few Judges There is no discusston of the point in this decision and I am unable to endorse the dicta of the Bench Art 233 of the Constitution requires the Governor to make appointments posting and promotion of the District Judges in consultation with the High Court Under Art 234 rules for recruitment to posts other than that of the District Judge are to be made by the Governor after consultation with the High Court Under Art 235 control over district courts including the posting promotion of and grant of leave to all persons holding any post inferior to the post of the District Judge is vested in the High Court This vesting of the control and the consultation of the High Court is an administrative function of the High Court There is nothing in Chap VI of Part VI of the Constitution

(1) A I R 1966 Raj 26

in which these Articles occur, either expressly or by necessary implication to indicate that the High Court means the whole High Court that is to say, all the Judges of the High Court These articles do not prescribe any procedure how the High Court is to act in the matter of consultation or in the matter of exercising the control vested in it

The High Court at Allahabad consists of 39 Judges at present. If it be held that the High Court means all the judges of the High Court then, the consultation will have to be with all the Judges Similarly the control vested in the High Court under Art 235 will have to be exercised by all the Judges Art 233 (2) contemplates direct recruitment to the post of District Judges on the recommendation of the High Court For such recruitment a large number of candidates running into hundreds apply and will have to be considered and examined It will be practically impossible for all the 39 Judges of the Court to perform the function of screening and examining or interviewing the various candidates The Supreme Court has in the *State of Assam* v *Rana Mohammad* (1) held that the function of transfer is included in the power of control vested in the High Court by Art 235 and is to be exercised by the High Court Matters like grant of leave to or transfer of individual officers will have to be considered by all the 39 Judges In the *State of West Bengal* v *N N Bagchi* (2) the Supreme Court has held that the word control in Art 235 includes disciplinary jurisdiction, and the High Court alone can hold enquiries and impose punishments other than dismissal or removal (which are included in power of appointment possessed by the Governor) If the submission advanced for the petitioner be right, all the 39 Judges will have to sit and

(1) Civil Appeal Nos 1967 and 1768 (2) (1966) 1 S C R 771
of 1966 decided on 21st September 1968

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hold the enquiry and pass orders This will involve immense practical difficulties It may become impossible to satisfactorily dispose of such matters So interpreted the provisions will become rigid

The Constitution aims at flexibility It does not place any of its functionaries in a straight jacket

The Constitution vests the executive power of the Union and the State in the President (Art 53) and the Governors (Art 154) The President and the Governors have by Arts 76(3) and 166(3) been authorised to make rules for the more convenient transaction of the business of the Government This is with a view to make the exercise of the executive power conveniently workable The Constitution in Arts 233 to 237 associates the High Court in certain matters and entrusts to it certain other powers in respect of the executive business relating to the administration of justice By Art 225 the Constitution preserves the powers of its Judges in relation to the administration of justice in the Court including power to make any rules of Court The High Court has thus been recognised to have the power to make rules of Court to govern the respective powers of the Judges in relation to the administration of justice in the Court The rules can provide for the allocation amongst Judges of the business of the Court relating to the administration of justice as also for the manner and method of its performance Such rules will facilitate the carrying out of the functions entrusted to the High Court in respect of administration of justice and would be valid

It was suggested that the term High Court should be construed to mean the whole Court for the purpose of important matters like appointments and promotion and not for minor questions like grant of leave or transfer There is no indication either in the language or the context, or the legislative history of these Articles

that High Court means differently according to whether the question is of promotion or grant of leave All these functions vest in the same entity Art 235 uses the term High Court only once and says that control including posting, promotion and grant of leave of officers shall vest in the High Court The same legal personality will in my opinion have power to act in respect of all these mentioned matters The meaning of the High Court should not be split up according to the importance of the function The Constitution by recognising the rule making power of the High Court intended to leave this to the High Court itself By framing appropriate rules the High Court would lay down as to which function will be performed by the whole Court that is to say by all the Judges and which one by committees consisting of lesser number of Judges or even individual Judges

Learned Counsel placed reliance on the Supreme Court decision in *High Court of Calcutta* v *Amal Kumar* (1) for the submission that the High Court can not delegate functions entrusted to it to any committee In my opinion this decision is no authority for that proposition There a Munsif challenged the action of the High Court in deferring consideration of his case for promotion to the post of subordinate Judge One submission was that the English committee of the Calcutta High Court had passed the order and that the English Committee had no jurisdiction to do so The Supreme Court held that this argument was advanced on the assumption that the High Court as such had delegated its power under Art 235 of the Constitution to the English Committee The Supreme Court rejected the submission It held that there was no allegation in the plaint that the resolution of the English committee was not adopted by the full Court in accordance

(1) A I R 1962 S C 1704

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with the rules of business laid down by that Court It also held that in accordance with the rules of the Court the English committee made recommendations which had to be placed before all the Judges of the High Court under the rules It then held that there was no basis for the submission either that the High Court had made unjustifiable delegation of the power under Art 235 of the Constitution or that the High Court as a whole did not pass the order which was the alleged cause of action

The Supreme Court has not in this case either expressly or by any implication given its approval to the assumption on which the argument was advanced that the High Court cannot delegate its power under Art 235 of the Constitution to a committee The Supreme Court dealt with the argument in the form in which it was advanced and rejected it on the preliminary ground that the argument does not arise because there was no factual foundation for it in the pleadings under the rules of the Court No occasion, therefore arose for the Supreme Court to consider the question of the correctness of the assumed basis that the allocation of such a power to a committee would either be a delegation of powers or that such delegation would be illegal or unconstitutional They have no where held that under Art 235 the High Court means the whole High Court that is to say all the Judges of the Court

There is nothing in the decision of the High Court in *Chandra Mohan* v *State of Uttar Pradesh* (1) to suggest that the High Court in these Articles means the whole court The Supreme Court held that under the Higher Judicial Service Rules the Governor prescribes the qualifications The selection Committee appointed by him selects the candidates The Governor in effect and in substance does not consult the High Court but

(1) A.I.R. 1966 S.C. 1987

only consults his selection committee The mentioned Selection Committee was to be appointed under the rules framed by the Governor That was not a committee of the High Court There is no suggestion anywhere in the judgment of the Supreme Court that if the Governor consults the High Court a committee of the Judges of the High Court cannot lawfully act for the Court It does not advert to the rules of the Court relating to the administrative business of the Court This decision therefore cannot be pressed in service for the submission that the High Court means the whole court or that the rules of the Court cannot make provisions for allocation of the administrative business of the Court

Assuming, however, that the requisite consultation has to be with the whole Court the next question is whether the petitioners have established that these 1951 rules were framed without consulting the whole Court For this purpose learned counsel for the petitioners placed reliance upon the facts mentioned in the counter affidavit filed by the State From that it appears that prior to 1952 there were two sets of rules governing the recruitment and conditions of service of Mermbers of the U P Civil Services (Judicial Branch) One was the U P Civil Services (Judicial Branch) Recruitment Rules 1940 and the other was U P Civil Services (Judicial Branch) Conditions of Service Rules 1942 The State Government considered it advisable to have a combined set of Civil Service rules for the U P Civil Service Judicial Branch and to constitute a separate set of service rules for the Higher Judicial Service The Higher Judicial service was to be in respect of the post of District Judge The U P Civil Service (Judicial Branch) was to comprise the posts inferior to that of a District Judge It framed a draft set of rules for both the proposed services and sent them to the High Court and the Public Service Commission for their comments

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on 29th July 1949. In the letter the Government indicated that the constitution of a Higher Judicial Service and the steps proposed for getting a better type of recruit for the lower Judicial Service will entail changes in the existing service rules for the United Provinces Civil Service (Judicial Branch) which has at present rules for recruitment and conditions of service. The letter further stated that the tentative proposals for a combined set of service rules for United Provinces Civil Service (Judicial Branch) as it will become on the establishment of a Higher Judicial Service, were enclosed in the second set of draft rules which were also for favour of the comments of the High Court/Commission.

Along with his reply dated 7th October, 1949 the Registrar of the High Court forwarded the comments of the Court on the draft rules of the United Provinces Higher Judicial Service and amendments to the U. P. Civil Services (Judicial Branch) (Recruitment) and (Conditions of Service) Rules. Some argument was made on the language of this letter. It was submitted that the High Court considered and sent its comments to the Government on the amendments to the pre existing rules for recruitment and conditions of service and not to the draft of the combined set of rules for U. P. Civil Services (Judicial Branch). This letter of the Registrar was in reply to the Government's letter dated July 29, 1949. It is to be read in the light of the contents of the letter of the Government. There is no suggestion in the present petition that the Government had made amendments to the pre existing recruitment and conditions of service rules, apart from the combined set of service rules. The Government had sent no such amendments to the High Court. The Registrar's letter cannot, hence be made the basis of the suggestion that

amendments to the pre existing rules On a fair read ing of this letter, it appears that the reference was to the combined set of service rules mentioned in the Govern ment letter of 29th July, 1949

An III to the counter affidavit is the reply from the Public Service Commission that the Commission had considered the draft rules for the United Provinces Civil (Judicial) Service and was sending its comments There after correspondence ensued between the State Govern ment and High Court on one hand and the State Government and the Public Service Commission on the other in respect of these rules The State Government finalised the rules and on 2nd January 1951 sent the final draft of the rules to the High Court for its com ments The Registrar of the High Court on 1st Febru ary 1951 forwarded to the Government the comments of the High Court on the final draft rules Thereafter the rules were published in the Gazette under the noti fication dated 29th September 1951 These rules called the U P Civil Service (Judicial Branch) Rules 1951 came into force with effect from 20th August 1952 The preamble of the rules states that in exercise of the powers conferred by the proviso to Art 309 of the Cons titution of India the Governor of Uttar Pradesh makes the following rules regulating recruitment to posts in and the conditions of service of person appointed to the Uttar Pradesh Civil Service (Judicial Branch)

From this correspondence it is clear that the Govern ment referred the proposed rules to the High Court for its comments It forwarded the finalised set of rules again to the High Court for its consideration The communication was to the High Court The consulta tion hence was with the High Court as such, and not with any individual judge or any committee of the High Court In para 12 of the petition the allegation that there was no consultation with the full Court has been

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based only on the aforesaid correspondence In para 14 of the petition it is stated that Art 234 does not contemplate consultation with a committee of Judges or with one or two individual Judges of the Court But it is nowhere alleged that the consultation was in fact made by the Government only with some individual Judges or with any committee of the Court In the absence of any positive allegation in this behalf the respondents could not be expected to make any detailed answer to this point or to furnish any information as to whether all the Judges of the High Court gave their opinion The State Government was under a duty to consult the High Court In discharging this duty it could only refer the rules to the High Court in order to consult it and ask the Court's opinion If the Government did this, it complied with the constitutional requirement of consulting the High Court The State Government could not predicate as to how the High Court will deal with the matter The same view was taken in *V K Kulkarni* v *State of Mysore* (1) On the materials the conclusion is inescapable that the rules were framed after consultation with the High Court

It was urged that the State Government's letter dated 2nd January, 1951 forwarding the enclosed draft set of rules was addressed to Hon'ble Mr Justice V BHARGAVA From this it was sought to be inferred that the Government consulted only Mr Justice BHARGAVA and not the Court If this fact had been alleged in the petition some explanation might have been forthcoming from the respondent's side The reply dated 1st February 1951 by the Registrar makes it clear that the matter was considered by the Court because he forwarded the views of the Court' to the State Government

Learned counsel for the petitioner relied upon Chap XXIII of the Rules of the Court as it existed in 1949

(1) A I R 1968 Mys 308

and urged that thereunder only the English Committee of the court acted for the Court in matters like recommendations as to the changes in the law etc The learned counsel has completely misapprehended the Rules of the Court Chap XXIII nowhere mentions an English Committee R 6 requires the matters mentioned in it to be referred to an English meeting Under cl (*d*) of r 6, matters upon which the Government desires the opinion of the whole Court are to be referred to an English meeting Obviously English meeting can only be of the whole Court that is to say of all the Judges of the Court It is a well known fact that English meeting in those days consisted of all the Judges Under r 14 English meeting is to be called by the Chief Justice when there is business to be disposed of at an English meeting Under r 15 the Registrar has to give to *each Judge* at least one clear day s notice of the meeting There is no provision in the rules for any committee consisting of lesser number of Judges All these aspects show that the English meeting was of all the Judges of the Court

The rules contained in Chap XXIII of the Rules of the Court were substituted by a new set of rules with effect from 30th April 1949 This new set of rules contemplated an Administrative Committee consisting of the Chief Justice and six other Judges Under r 9 of this Chapter all the Judges of the Court have to be consulted, *inter alia*, in respect of proposed changes in the law by cl (*a*) and in matters which the Administrative Committee considers fit to be laid before them for consideration under cl (*i*) The change in the service rules was a change in the law and came under cl (*a*) of r 9 of Chap XXIII Under the rules, all the Judges of the Court had to consider the matter On the basis of these rules, therefore it cannot be urged that all the Judges of the Court were not required to be consulted in the

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matter of framing of the rules for the U. P. Civil Service Judicial Branch.

The High Court Rules were repealed and re-enacted in 1952. The re-enacted set of rules came into force on the 15th day of September 1952 that is after the Civil Service Judicial Branch Rules had been framed published and also enforced with effect from 20th August 1952. These new rules therefore will not govern the matter. But assuming that they did the position is no different because the relevant rules are contained in Chap. III of the Rules and are to the same effect as Chap. XXIII of the old rules after its amendment in 1949. On the basis of the rules, therefore it cannot successfully be urged that the whole Court was not consulted.

It was next urged that consultation within the meaning of Art. 234 can only be at a meeting or conference of the Judges of the Court and not by the process of circulation to individual judges. This presupposes that the matter was dealt with in the High Court by the process of circulation and not at a meeting of the Judges. There is no averment to this effect. The requisite factual foundation for this submission not having been laid in the petition. I do not consider it necessary to deal with it any further.

The next point that needs consideration is whether the rules have been framed under Art. 234 of the Constitution. The preamble to the rules states that they have been framed in the exercise of the powers conferred by the proviso to Art. 309 of the Constitution and that they relate to the recruitment and conditions of service. Under the proviso to Art. 309 the Governor could legitimately frame rules governing the conditions of service. Art. 234 requires the Governor to consult the High Court before making the rules for recruitment. The Governor, therefore had the requisite power to frame rules regarding recruitment. The question is whether

the non mention of Art 284 of the Constitution in the preamble invalidates them In my opinion the answer should be in the negative There is ample authority for it

In *Afzal Ullah* v *State of Uttar Pradesh* (1) certain bye laws were made by a municipality under s 298(2) cls A(*a*) (*b*) and (*c*), it was held by the Supreme Court that—

> The validity of the bye laws must be tested by reference to the question as to whether the Board had the power to make those bye laws If the power is otherwise established the fact that the source of the power has incorrectly or inaccurately been indicated in the preamble to the bye laws would not make the bye laws invalid [vide *P Bala Fotiah* v *Union of India*, (2)]

Similarly, in *Gopal Narain* v *State of Uttar Pradesh* (3) the Supreme Court *held* that—

> 'The question of the validity of the tax depends upon the existence of power to tax in respect of a subject The Municipal Board had certainly power to impose the scavenging tax The mention of cl (xii) in the notification appears to be a mistake for cl (xi) and that does not affect the power of the Municipal Board to impose the tax

In another case *L Hazari Mal* v *I T Officer* (4) the Supreme Court ruled that the principle is well settled that the exercise of the power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be a nugatory

In yet another case, the Supreme Court held that rules purporting to have been made under one provision, were partly sustainable under that provision, but the

(1) A I R 1964 S C 264 (2) A I R 1958 S C 232 236
(3) 1964 A L J 479 (4) A I R 1961 S C 200 (209)

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S Chander J

other part subserved the purpose of another provision which was not mentioned more the less the rules would be valid because the two powers will concur to sustain them [Vide *E M Muthappa Chettiar* v *I T Officer* (1)] Similar views were expressed by a Division Bench of this Court in *State of U P* v *O P Sharma* (2) The Governor had power to frame rules relating to recruitment under Art 234 and about conditions of service under the first proviso to Art 309 The impugned rules being in respect of both matters are valid because both powers will concur to sustain them and the mere non mention of Art 234 in the preamble will not affect their validity The only effect of non mention of Art 234 would be that no presumption could be raised that the High Court was consulted The respondents do not rely on any presumption They have sought to establish the fact by evidence

The third submission of learned counsel was that consultation under Art 234 could only be after 26th January, 1950 when the Constitution came into force The process of consultation commenced in 1949 and was of no legal value as Art 234 was not in existence then I am unable to endorse this submission The Government consulted the High Court in 1951 afresh, on the finalized draft set of the rules That satisfied Art 234 Moreover the Government of India Act 1935 by Art 255 also similarly required consultation with the High Court The consultation in 1949 was hence under valid legal authority S 6 of the General Clauses Act read with Art 367 of the Constitution will save the validity of these pre-constitution proceedings

The facts mentioned above show that the Public Service Commission was in fact consulted There is hence no merit in the fourth point raised by learned counsel

(1) A I R 1960 S.C. 908 (2)(1964 A.L.J 764

The next submission of the learned counsel was that under Art 234 of the Constitution the Governor has to consult the High Court and the Public Service Commission for each appointment and not for framing the rules relating to recruitment The question is whether the consultation referred to in Art 234 is with reference to the appointments mentioned at the beginning of the Article or to the framing of the rules The language of Art 234 is not amenable to the interpretation that the consultation has to be for both of them, i e for appointments as well as for making of the rules The legislative history of the Article can usefully be looked into to throw light on the intention of the Legislature The Supreme Court has outlined the Development of the law on this matter in detail in *State of West Bengal v Nripendra Nath Bagchi* (1) HIDAYATULLAH, J pointed out that the Islington Commission in its report referred to the question of the separation of the executive from the judiciary The Government of India Act 1915 did not make any provision for this separation The question of the independence of the judiciary was considered by the joint committee when the Government of India Act 1935 was on the anvil The Committee recommended the separation of the subordinate judiciary As a result the Government of India Act, 1935 contained special provisions (Arts 254—256) with regard to District Judges and the subordinate judiciary Art 255(1) of that Act provided —

> The Governor of each Province shall, after consultation with the Provincial Public Service Commission and with the High Court make rules defining the standard of qualifications to be attained by persons desirious of entering the subordinate civil judicial service of a province

This Article was a part of Chap 2 of Part X which dealt with the Civil Services generally Thus the first step

(1) (1966) 1 SCR 771

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for achieving the independence of subordinate judiciary was taken. The Governor was to frame rules in consultation with the High Court for defining the standard of qualification for the subordinate Civil Judicial services. The consultation was for making the rules. When the Constitution came to be drafted an advance was made in two respects. The provisions about subordinate judiciary were separated from Part XIV of the Constitution which dealt with the services under the Union and the States and were incorporated in Part VI immediately after the provisions relating to the High Courts. Secondly, the High Court was associated with the entire matter of recruitment to the subordinate judicial service. This included not merely the standard of qualifications but also the method of recruitment as well as the manner of appointment to the Service that is by probation and confirmation. The idea was to make progress towards the goal of independence of the subordinate judiciary. Under Art. 235 of the Government of India Act the consultation with the High Court was for making of the rules. The same scheme was continued by the Constitution but the scope of the rules was enlarged. The intention was to make consultation with the High Court compulsory at the stage of the framing of the rules and merely at the time of individual appointment. The submission of the learned counsel if accepted, would mean that the Governor need not consult the High Court in the matter of making the rules for recruitment. That will instead of advancing the manifest intention of securing independence of the subordinate judiciary set the clock back.

The intention behind taking out the provisions relating to subordinate courts from Part XIV of the Constitution and putting them in Part VI seems to be to make the consultation with the High Court in the matter of

framing of the rules really effective and thus to secure the independence of the subordinate Judiciary from executive [See *Chandra Mohan* v *State of U P* (1)] Under the proviso to Art 309 the Governor is competent to frame rules relating to recruitment as well as conditions of service The rules made by the Governor operate only until a provision in that behalf is made by an Act of the Legislature The legislature while making an Act under Art 309 is not required even by Art 234 to consult any one The provision for consultation with the High Court would become nugatory as soon as the legislature acted to enact To avoid this and to keep the rules governing recruitment to the judicial service outside the purview of the State Legislature Art 234 was taken out of Part XIV which includes Art 309 Art 309 is subject to the other provisions of the Constitution which means and includes Art 234 Art 234 on the other hand is not subject to any other provision of the Constitution The rules made under Art 234 will hence not be subject to any Act of Legislature made under Art 309 Then again if the Governor alone was to frame the rules for recruitment to the judicial service there was no point in making this invidious distinction between the rules for the judicial and the other services This distinction became necessary because the rules for the Judicial Service were to be framed in consultation with the High Court All these aspects of the matter lead to the inevitable view that Art 234 requires consultation with the High Court only in the matter of the making of the rules

Learned counsel for the State referred me to the decision of RAJAGOPALA AYYANGAR J in *N Devasahayam* v *State of Madras* (2) In para 24 his Lordship has with reference to Art 234 pointed out that —

(1) A I R 1966 S C 1987 (Para 14) (2) A I R 1958 Mad 52

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The absence of a comma or other punctuation mark in the Article which may serve to specify the appointment as the event which requires the consultation appeared to me very significant In the absence of any punctuation mark the grammar of the Article seemed to point to the consultation referred to being in relation to the making of the rules

His Lordship further drew support from Art 237 of the Constitution He observed

> It (Art 237) refers to the foregoing provisions of this Chapter and any rules made thereunder and there is no other article in the chapter which refers to any rules made under it except Art 234 The reference to the rules in Art 237 must therefore have been to the rules made under Art 234 which necessarily meant (a) that the rules might be made under Art 234 and (b) that these rules required prior consultation of the authorities named before they are made

In *Bagchi's case* (1) also the Supreme Court read Art 234 in the same way Referring to Arts 233 and 234, HIDAYAT ULLAH J observed at page 779

> They also provide for special rules to be made by the Governor of the State after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to each State

Later on at the bottom of page 786 his Lordship observed

> In the case of the Judicial service subordinate to the District Judge the appointment has to be made by the Governor in accordance with the rules to be framed after consultation with the State Public Service Commission and the High Court

(1) (1966) 1 SCR 771

It is true that Art 234 was not up for interpretation before the Supreme Court but none the less the observations are clear and cogent Art 234 was read in the same manner by the Supreme Court in *Chandra Mohan v State of U P* (1) In my opinion the learned counsel for the petitioner is not right in contending that the High Court must in view of Art 234 be consulted for each appointment of a person to the judicial service

The second limb of this argument relates to r 21 of the Rules R 21 provides that the Governor shall consult the High Court and shall after taking into consideration the views of the High Court select candidates for appointment It is urged that the appointment of the respondent was not made after consulting the High Court I may again observe with regret that this submission has been made without any such averment in the petition It has nowhere been said that the appointment of the respondent had been made without consulting the High Court This apart sub r (2) of r 32 of the rules provides a saving clause It says

> When in his opinion it appears necessary to do so the Governor may make any appointment to the service in relaxation of these rules and in case of any appointment which is not in strict accordance with the rules the Governor shall be deemed to have made the appointment in relaxation of the rules

The position therefore is that if there has been any breach of r 21 the appointment will be deemed to have been made in relaxation of the said rule The appointment therefore cannot be held to be illegal on that ground

In some of the other writ petitions which were also heard along with this one the incumbent is occupying the post of Civil Judge In those petitions (nos 3386 of 1966 3712 of 1966 3788 of 1966 3790 of 1966 3943 of 1966 4214 of 1966 and 4221 of 1966) the only ground

(1) A I R 1966 S C 1987 at p 1988

taken was that the rules were invalid and hence also the appointment to the service. At the hearing learned counsel urged that appointment to the service is made on the post of munsif. Thereafter the officer is promoted to the post of Civil Judge. Under Art. 233 of the Constitution promotion vests exclusively in the High Court. The promotion of the respondent officer not having been done by the High Court he could not validly occupy the post of Civil Judge. This submission again was made without any averment in the petition that the High Court did not pass the requisite order or that some one else did. In the circumstances the submission cannot be entertained. Thus all the submissions are without merit.

The petition fails and is dismissed with costs.

Petition dismissed.

Jai Parkash v. Mohan Singh S. Chandra J.

SUPREME COURT

APPELLATE CRIMINAL

Before Mr Justice Hidayatullah Mr Justice Shelat and Mr Justice Mitter

1965
February 2

SHEP SINGH AND OTHERS APPELLANTS

v

STATE OF U P RESPONDENT

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Code of Criminal Procedure, *(Act V of)* 1898 s 417—*Appeal against acquittal—Extent of the powers of High Court on —*

The powers of the High Court in an appeal from an acquittal are in no way different from those in an appeal from a conviction The High Court can consider the evidence and weigh the probabilities It can accept evidence rejected by the Sessions Judge and reject evidence accepted by him unless the Sessions Judge relied upon his observations of the demeanour of a particular witness In departing from the conclusions of the Sessions Judge the High Court must pay due attention to the grounds on which the acquittal is based and repel those grounds satisfactorily bearing in mind always that the accused starts with a presumption of innocence in his favour and this presumption cannot be less strong after the acquittal If these matters are properly kept in mind and acquittal is reversed there can be no objection because the High Court is empowered by law to reverse an acquittal

Criminal Appeal no 191 of 1964 from the Judgment and Order of the Allahabad High Court in Government Appeal no 1886 of 1962

A S R Chari (*A K Nag* with him) for the Appellants

O P Rana for the Respondent

The following Judgment of the Court was delivered by—

HIDAYATULLAH J —The three appellants have been convicted by the High Court of Allahabad under s 302/34 of the Indian Penal Code for the murder of one Hari pal and sentenced to rigorous imprisonment for life after reversing their acquittal by the Sessions Judge, Meerut

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Originally five persons were tried for this offence All of them were acquitted by the Sessions Court On appeal the acquittal of the other two (Shanker and Tarif) was maintained but the three appellants (Sher Singh Baljor and Vijaipal) were convicted They now appeal by special leave granted by this Court

The appellants are brothers and sons of Narayan Singh Tarif and Shanker are brothers of Narayan Singh The deceased Harpal was the brother of Nahar Singh (P W 1) and Amichand (P W 2) The house of Amichand and his brothers is in front of that of the appellants in *Mauza* Amanullahpur Police Station Jani district Meerut where the offence was committed

As frequently happens this murder was the result of a petty quarrel earlier over the taking of carts through fields It is hardly necessary to recount in detail what had then happened Suffice it to say that Sher Singh took his cart through Harpal's field and there was a wordy quarrel Next Sher Singh stopped a cart in which Harpal was carrying sugarcane and Harpal kicked Sher Singh and beat him with fist blows Nahar Singh (P W 1) and Khazan (P W 7) separated them The murder followed close upon the heels of the second incident

The case of the prosecution is that a fortnight later on the morning of 26th November, 1961 at about 7 a m Harpal left his *ghar* (compound) to answer a call of nature Near the gate of his house the appellants and the two accused (since acquitted) fell upon him Sher Singh and Vijaipal had spears and Shanker and Baljor had *lathis* They beat Harpal with their weapons Tarif who also had a stick took no part in the beating but exhorted the others to kill Harpal Harpal was pierced in the chest and abdomen with spears and struck with sticks On his shout for help his brothers Nahar Singh and Amichand who were working in the back portion of their house came running and three or four witnesses

Bhupal (P W 2) Tara (P W 3) Karura (P W 4) and one Atar Singh (who was not examined) came from different sides The assailants then fled Harpal who had fallen down was lifted placed on a cot and covered with a quilt He was however dead The autopsy later disclosed two penetrating wounds in his chest each of which had torn through his heart a penetrating wound transfixing the stomach and some contusions He must have died in a matter of minutes The five accused were tried for his murder but were acquitted On appeal the three appellants were convicted and sentenced

The learned Sessions Judge in a long judgment exhaustively discussed the evidence but lost himself in the details of family relationship and other irrelevant matters sedulously brought out in a desultory cross examination He found it difficult to accept any part of the testimony of the eye witnesses The High Court on a reappraisal of the evidence came to a contrary conclusion although it maintained the acquittal of Shanker and Tarif by giving them the benefit of the doubt In this appeal Mr *Chari* learned counsel for the appellants drew our attention to the evidence of the eye witnesses and contended that their testimony was unsatisfactory He submitted that this was not a fit case for the reversal of an acquittal regard being had to the observations of this Court in *Sanwat Singh v Rajasthan* (1) since an acquittal reinforces the presumption of innocence We shall deal with both the aspects of his argument

It has been pointed out before by this Court as also the Judicial Committee that the powers of the High Court in an appeal from an acquittal are in no way different from those in an appeal from a conviction The High Court can consider the evidence and weigh the probabilities It can accept evidence rejected by the Sessions Judge and reject evidence accepted by him unless the

(1) (1961) 3 S C R 120

Sessions Judge relied upon his observations of the de-
meanour of a particular witness In departing from the
conclusions of the Sessions Judge the High Court must
pay due attention to the grounds on which the acquittal
is based and repel those grounds satisfactorily bearing in
mind always that an accused starts with a presumption
of innocence in his favour and this presumption cannot
certainly be less strong after the acquittal If these
matters are properly kept in view and the acquittal is
reversed there can be no objection because our Crimi-
nal jurisdiction empowers the High Court to reverse an
acquittal

In this case the High Court reassessed the evidence and considered the grounds for its rejection by the Sessions Judge Mr *Chari* contended that the High Court ignored several factors His argument was that the High Court ought to have seen that the medical evidence contradicted the oral testimony the evidence clearly showed that the attack must have taken place elsewhere and that the eye witnesses were interested in the victim and hostile to the accused We shall now consider these objections

Harpal had three penetrating injuries on his chest and abdomen One was a stab wound chest cavity deep and the direction was medially downwards The second was a stab wound 2½" below the left nipple in the 7th intercostal space near stomach The wound was partially medial and upward and chest deep The third was a stab wound on the mid part of the epigastric region in the midline and it was up to the back from the front and abdominal deep The other injuries may be ignored The first two injuries had punctured the heart and the third the stomach There was 8 oz of clotted blood in the pleura 8 oz of clotted blood in the peritoneum and 1 lb semi clotted blood in the pericardium The large

intestines contained faecal matter and the bladder was empty

Mr *Chari* said that the description of the injuries shows that Harpal must be lying down and not standing when the first and second blows were given because one stab was downwards and the other upwards This is not conclusive Much depends upon the respective heights of the assailants in relation to that of the victim, the lie of the land and the moves to avoid the blows by the latter There is nothing inherently improbable in the situation and direction of the injuries which can be said to contradict flatly the evidence of the eye witnesses The injuries were such as could be inflicted at the gate of the house or elsewhere and no inference against the testimony of the eye witnesses can be drawn

Mr *Chari* sought to strengthen this argument from the circumstances that no blood was found at the spot, or in the *tidri* where the cot was spread or on the clothes The Sub Inspector Chauhal (P W 10) said that the place of the attack was sandy and blood had probably been trampled upon We have shown that the body contained 1 lb and 11 ounces of blood in its various parts and this showed considerable internal bleeding It must be remembered that Harpal had worn a *kurta*, a *dhoti* and a *khes* It is likely that these between them absorbed the external bleeding which appears to be comparatively small At least one witness described that the clothes were drenched in blood which they must have been wherever the murder took place It is a pity that the clothes were not sent to the Serologist but we do not think that an adverse inference can be drawn from this circumstance The evidence of the eye witnesses is consistent That the incident took place at the very door step of Harpal makes the presence of his brothers probable because they were in the house The offence took place in day light and there could be no mistake The

report was made almost at once and the names of the
SHUKLA
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U. P.
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J.
assailants and eye witnesses were mentioned in it Although it said that many other villagers saw the attack it is perhaps because the maker presumed that this must have been so The emptiness of the bladder showed that the victim had voided but the fullness of the bigger intestines supported the prosecution version that he was going out to ease himself

We have had the evidence of the eye witnesses read to us and after careful consideration we are satisfied that it is consistent convincing and credible The Sessions Judge lost sight of the main issue namely whether what the eye witnesses said was credible in an attempt to examine the interrelation of the witnesses This is an inquiry of value up to a point but is not conclusive because there is no crime proved in small village communities where some kind of relationship cannot be established between witnesses and the victim and some petty quarrel shown to have taken place in the past between some of the witnesses and the accused To decide a case on the basis of such circumstances unless they are of great or significant magnitude is to place reliance on collateral circumstances at the expense of direct evidence of guilt which really matters The first serves as a check upon the latter but no more The evidence of the eye witnesses here is clear We accept the findings of the High Court which are supported by evidence of sufficient probative force to satisfy us The appeal fails and will be dismissed

Appeal dismissed

CRIMINAL REVISION

Before Mr Justice Gyanendra Kumar

GOPALJI BRAHMACHARI ... APPLICANT

v

PARSHOTTAMCHARI ... OPPOSITE PARTY

1967

March 3

Criminal Procedure Code, *(Act V of)* 1898 ss. *476 and 479 A*—*Applicability of—Witness not appearing before the Court and only filing affidavit*—S. 479 A *in* s. 476 *applies*—S. 479 *(6) not applicable—If cl. (6) thereof still applies*

Before s. 479 A can apply it is incumbent on the Court to form an opinion that a particular witness appearing before it gave false evidence. It is therefore absolutely essential that the witness in question must appear in person before the Court. Where therefore a person files a false affidavit only and does not appear before the Court as a witness the procedure under s. 479 A would be inapplicable and the case would be governed by s. 476 Cr. P. C.

Where s. 479 A itself is inapplicable the bar under cl. (6) thereof cannot be invoked

Kuppa Gowdan v. *M. S. P. Rajesh (1) C. P. Yadva* v. *State* (2) followed and *Babban Singh* v. *Jagdish Singh* (3) distinguished

Criminal Revision no. 179 of 1961

Ramesh Sharma for the Applicant

I. K. S. Chaudhry for the Opposite party

G. KUMAR, J.—This is an application by Gopalji Brahmachari under s. 476 Cr. P. C. for ordering the prosecution of the opposite party Parshottamchari for having filed a false affidavit in this Court in Criminal Revision no. 179 of 1961 (*Babu Singh and Pritam Singh* v. *Gopalji*). The facts giving rise to the instant application are as under. Adi Shankaracharya had established various *Maths*, one of them being Jyotirmath near

(1) A.I.R. 1966 S.C. 1888 (2) 1965 A.L.J. 920
(3) A.I.R. 1961 S.C. 65

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GOPALJI BRAHMACHARI v. PARSHOTTAM CHARI

Kumar J

Badrikashram in the district of Chamoli Swami Brahmanand Saraswati was the Shankaracharya of Jyotirmath After his demise a dispute arose between Swami Krishna Bodh Ashram and Swami Shantanand Saraswati, *inter alia* regarding possession and management of the *Math* Gopalji Brahmachari is the Agent and Attorney of Swami Krishnabodh Ashram while Baddu Singh and Pratap Singh are servants and employees of Swami Shanta Nand As Agent and Attorney of Swami Krishna bodh Ashram Gopalji had filed an application under s 145 Cr P C in respect of the *Math* against Baddu Singh and Pratap Singh servants of Swami Shanta Nand The Magistrate found the second party to be in possession and restrained the first party from interfering with their possession

Being dissatisfied with the above finding Gopalji went up in revision to the Sessions Judge who made a reference to the High Court This Court quashed the proceedings and remanded the case to the Magistrate for rehearing On remand the Magistrate attached the *Math* property by his order dated 20th November 1963 Baddu Singh and Pratap Singh felt aggrieved by the aforesaid order of attachment of the *Math* property and went up in revision to the District Magistrate of Chamoli who dismissed the same by his order dated 21st January 1964 They then filed Criminal Revision no 179 of 1964 in this Court on 31st January 1964 wherein Gopalji was arrayed as opposite party By his order of that date, MATHUR, J gave certain directions to the Magistrate for interim arrangement and possession of the *Math*, after hearing the parties In compliance of the aforesaid order of MATHUR J the Magistrate by his order dated 18th March 1964 put the *Math* property under the interim management and *supurdagi* of Gopalji Baddu Singh and Pratap Singh felt aggrieved by the aforesaid order and went up in revision to the District Magistrate

of Chamoli who dismissed the same on 23rd June, 1964 Thereafter they filed Criminal Revision no 1471 of 1964 in this Court

On 10th May 1965 Baddu Singh and Pratap Singh filed Criminal Miscellaneous Application no 128 of 1965 in Criminal Revision no 179 of 1964 saying that Gopalji opposite party who had been entrusted with the management of Jyotirmath by the Magistrate had become a lunatic with the result that the *Math* was lying in an abandoned condition without anybody taking care of it and that there was no person to look after the *sannyasis* and *sadhus* visiting Badrinath and Kedarnath In the end a prayer was made for appointment of a Receiver or another *Supurdar* for the Jyotirmath In support of the above application the affidavit of Swami Parshottamchari (present opposite party) was filed who deposed on his personal knowledge that Gopalji had become a lunatic and the *Math* property was lying in an abandoned condition This application came up before me on 18th May 1965 when I directed the S D M Joshimath to enquire into the matter and if he found that Gopalji had become insane and was not capable of managing the *Math* he should forthwith be substituted by another competent *supurdar*

In his report dated 29th July 1965 the S D M remarked as under

> After a careful perusal of the evidence produced by the parties and the opinion of Civil Surgeon Chamoli and my personal observation of Gopalji in the Court during his various appearances I am convinced that Gopalji was in full command of his senses He (Gopalji) was neither a lunatic nor insane and the allegations levelled against him by Baddu Singh and others were not only baseless but mischievious It appears to me that Baddu Singh in order to obtain the *supurdagi* of the *Math* has

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GOPAL JI BRAHMACHARI v. LAKSHMAN GIRI

G. Khanna, J.

taken recourse to the charge of insanity against Gopalji and has tried to enter the *Math* by the back.

Both the aforesaid revision nos. 179 and 1171 of 1961 were dismissed by MATHUR, J. but while doing so he authorised the Magistrate to consider the question of change of the *supurdas* at a later stage if he was satisfied that the new manager would be in a position to properly look after the management of the *Math* property. At the instance of Swami Shanta Nand on 2nd March 1966 the S. D. M. of Joshimath removed Gopalji from the *supurdagi* of the *Math* and appointed Shivanand Brahmachari and Indu Prakash Upadhyay as *supurdars*.

On 5th April 1966 Gopalji filed Criminal Miscellaneous Application no. 1110 of 1966 under s. 561-A Cr. P. C. in the connected Criminal Revisions for review of the aforesaid order dated 16th December 1965 and prayed for quashing of the order of the S. D. M. dated 25th March 1966. The above application came up before MATHUR, J. on 21st April 1966 who ordered issue of notice to Baddu Singh and Pratap Singh employees of Swami Shanta Nand. On 13th September 1966 Gopalji filed the instant Criminal Miscellaneous Application no. 2862 of 1966 under s. 476 Cr. P. C. in Criminal Revision no. 179 of 1961 for prosecution of Parshottamchari under s. 193 I. P. C. on account of his having filed a false affidavit in this court alleging that the applicant (Gopalji) had become insane and was unfit to manage the *Math* property as *supurdar*. It may be mentioned here that notices ordered to be issued by MATHUR, J. on Gopalji's review application no. 1110 of 1966 remained unserved on the two opposite parties (Baddu Singh and Pratap Singh) with the result that on 30th November 1966 fresh notices were ordered to be issued to both of them. However, due to the strike by the High Court employees the notices were issued on 28th February, 1967 and have not yet returned after service.

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GOPALJI BRAHMACHARI v. PARSHOTTAM CHARI

Kumar J

On Gopalji's application under s 476 Cr P C I had passed the following order on 29th September 1965

> Parshottamchari has apparently sworn a false affidavit alleged to be true to his personal knowledge that Gopalji Brahmachari had become insane and incapable of managing the *Math* property This is belied by the certificate of the Civil Surgeon and the report of the S D M as well as by the contents of this application
>
> It is expedient in the interest of justice that an enquiry should be made into the offence punishable under s 193 I P C which appears to have been committed in this Court
>
> The opposite party shall show cause why a complaint should not be filed against him for an offence punishable under s 193 I P C

On 27th February 1967 a written reply was filed on behalf of Parshottamchari reiterating that Gopalji had become insane and was kept confined at Dharam Sangh Delhi and was under treatment there for his mental disease for about 6 months that the *Math* lay in an abandoned condition and it was only after Gopalji got well that he had appeared before the Magistrate and was examined by the Civil Surgeon With regard to the opinion of the Civil Surgeon and the Magistrate about the mental condition of Gopalji it was stated that the same related to the condition of his mind in July, 1965 when he was examined by the Civil Surgeon and had appeared before the Magistrate but it was incorrect to say that he had never become a lunatic before It was further contended on behalf of Parshottamchari that the present enquiry was barred by sub-s (6) of s 479 A Cr P C

In support of his last contention Mr *V A S Chaudhary* appearing for Parshottamchari has placed reliance

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upon the decision of the Supreme Court in *Baban Singh v Jagdish Singh* (1) which was decided on 8th February, 1966. It was a case in which the High Court of Patna had ordered its Registrar to file a complaint under s 195, I P C against two persons for filing false affidavits in the High Court, on application made by the respondents thereto under s 476 Cr P C. The brief facts of that case were that Jagdish Singh and Parmhans were appellants in a First Appeal pending in the High Court of Patna wherein Smt Dharichhan Kuer was respondent no 13. During the pendency of the appeal a compromise was said to have been arrived at between Dharichhan Kuer on the one hand and Jagdish Singh and Parmhans on the other. Both these appellants swore an affidavit on 22nd June 1953 in support of the compromise application filed in the High Court. Dharichhan Kuer was identified before the Oath Commissioner and Rs 4 000 were paid to her under the terms of the compromise in the presence of the Oath Commissioner for which a receipt bearing her thumb impression was also passed on to Jagdish Singh and Parmhans. The petition of compromise was filed in Patna High Court on 13th July 1953. The same day, Baban Singh husband of Dharichhan Kuer swore an affidavit denying the compromise and payment of Rs 4 000 to his wife. Later on Dharichhan Kuer also filed an affidavit in support of her husband's affidavit.

As the compromise became disputed, the High Court ordered the Registrar to hold an enquiry. Nine witnesses were examined on behalf of Jagdish Singh and Parmhans, while Dharichhan Kuer and her husband Baban Singh also gave their testimony. The Registrar reported on 14th July, 1954 that the compromise was genuine and that Dharichhan Kuer had received Rs 4 000. The two Judges of Patna High Court accepted the report of

(1) A I R 1967 S C 68

the Registrar One of the terms of the compromise was that if Dharichhan Kuer resiled from it, the amount of Rs 4 000 would be refunded with Rs 500 as costs Dharichhan Kuer deposited the said amount and the First Appeal was then heard and disposed of

Jagdish Singh and Parmhans had already filed the aforesaid application under s 476 Cr P C but it was taken up for hearing after the disposal of the First Appeal Under the above circumstances, a question arose whether the complaint for prosecution of Baban Singh and Dharichhan Kuer for an offence under s 193 I P C could be filed in the High Court when they had made false depositions not before the Court but before the Registrar In that case the counsel for Jagdish Singh and Parmhans had conceded that no prosecution could take place under s 193 I P C because of the bar of s 479 A Cr P C The High Court however considered that Baban Singh and Dharichhan Kuer could be proceeded against under s 476 Cr P C in respect of their false affidavits filed in the First Appeal and therefore ordered the Registrar to lodge a complaint against them Baban Singh and Dharichhan Kuer thereupon went up in appeal to the Supreme Court under s 476 B Cr P C It may be mentioned that in spite of notices having been issued to Jagdish Singh and Parmhans as well as the State Government none of them appeared at the hearing Therefore their Lordships of the Supreme Court had only the benefit of the arguments advanced by the learned counsel for Baban Singh and his wife Dharichhan Kuer appellants

After considering the provisions of s 479 A their Lordships of the Supreme Court posed a question for decision Does the swearing of the false affidavits amount to an offence under s 199 Indian Penal Code or under s 191 or 192 I P C ? They came to the

conclusion that the offence of swearing false affidavits would fall within the ambit of s 191 as also of s 192 I P C inasmuch as when the affidavits of Babun Singh and Dhanchhan Kuer were tendered in the High Court to be taken into consideration they intended the statements to appear in evidence in a judicial proceeding and so appearing to cause the Court to entertain an erroneous opinion regarding the compromise In this way their offence came within the words of ss 191 192 rather than s 199 I P C They were thus *prima facie* guilty of an offence of giving false evidence or of fabricating false evidence for the purpose of being used in judicial proceeding

Then Lordships went on to remark s 479 A laws down a special procedure which applies to persons who appear as witnesses before civil revenue or criminal courts and do one of two things (1) intentionally give false evidence in any stage of the judicial proceeding or (2) intentionally fabricate false evidence for the purpose of being used in any stage of the judicial proceeding The first refers to an offence under ss 191/193 and the second to that under ss 192/193 of the Indian Penal Code In respect of such offences when committed by a witness action under s 479 A alone can be taken The appellants were witnesses in the enquiry in the High Court and they had fabricated false evidence If any prosecution was to be started against them the High Court ought to have followed the procedure under s 479 A Cr P C Not having done so the action under s 476 of the Indian Penal Code was not open because of sub s (6) of s 479 A and the order under appeal cannot be allowed to stand

With the greatest respect it may be pointed out that the only enquiry which was made in the matter was the one before the Registrar where the parties had

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examined their respective witnesses It may be remembered that Baban Singh and Dhanichhan Kuer had examined themselves alone as their own witnesses before the Registrar in the enquiry entrusted to him by the High Court There can be little doubt that if Baban Singh and his wife were to be prosecuted for their depositions made during the enquiry before the Registrar the provisions of s 479 A (6) Cr P C would at once come to their rescue inasmuch as they had actually appeared as witnesses before him But in the case in question they were sought to be proceeded against in respect of their affidavits which they had filed earlier in the High Court denying the compromise and payment of Rs 4 000 Those affidavits were admittedly sworn and verified before the Oath Commissioner and at no stage had their deponents appeared before the Court as witnesses Simply because they had tendered their affidavits in the High Court and had intended the statements contained therein to form evidence in the pending judicial proceedings the same cannot be considered to be their appearance as witnesses before that Court inasmuch as the words used in s 479 A are any person appearing before it as a witness has intentionally given false evidence This aspect of the matter does not appear to have been placed before the Supreme Court because neither the respondent nor the State had entered appearance at the hearing of *Baban Singh's* (1) appeal before the Supreme Court

I have had occasion to consider the above question in *C P Vedia* v *State* (2) and I was of the opinion that the person complained of must necessarily appear as a witness in the Court before proceedings under s 479 A Cr P C could be launched against him and a witness so appearing he must have intentionally given or

(1) A I R 1966 S C 66 (2) 1965 A L J 991

fabricated false evidence Merely filing of an affidavit, in a judicial proceeding without actually appearing as a witness before the Court would not attract the provisions of s 479 A (1) For that purpose a person must step into the witness box and make his depositions in a judicial proceeding pending before a court of law

To take an illustration if A had sworn a false affidavit at Delhi but had filed it in a Court at Allahabad and the deponent thereof was never required to appear as a witness in Allahabad Court for cross examination etc but his affidavit was simply tendered as evidence in a judicial proceeding in Allahabad Court can it be said that A had appeared before the Allahabad Court as a witness and had intentionally given false evidence in the judicial proceedings pending in that Court within the meaning of s 479 A(1) Cr P C ? It is abundantly clear that the mere tendering of a piece of paper in the shape of an affidavit cannot be called the appearance of its deponent as a witness before that Court

Mr *Ramesh Sharma* appearing for the petitioner has on the other hand placed reliance on the case of *Kuppa Goundan* v *M S P Rajesh* (1) It may be mentioned that in this case one of the learned Judges was HIDAYATULLAH, J who had delivered the judgment in *Baban Singh's* case (2) on 8th February 1966 while *Kuppa Goundan's* case (1) was decided on 5th of May, 1966 and was thus a later authority wherein the ambit and scope of s 476 *vis a vis* s 479 A Cr P C were considered

In *Kuppa Goundan's* case (1) the facts were that four persons other than M S P Rajesh were prosecuted by the appellants thereto, under ss 323 325 and 448, I P C However at the trial P W 1 Kuppa Goun

(1) A I R 1966 S C 1863 (2) A I R 1967 S C 68

dan and another person who was P W 2 falsely deposed that Kuppa Goundan was also among the trespassers and assailants and that he was armed with a gun which another accused had later on taken from him After the conclusion of the trial Kuppa Goundan filed a petition before the Magistrate under s 476(1) Cr P C alleging that on the date of occurrence that is 11th October 1963 he along with certain other Directors had attended a meeting of the Board of Directors of Chembia Peak Estate Ltd from 4 30 p m to 5 15 p m at Bangalore and that he was not at Yercaud on 11th October 1963 on which date the occurrence had taken place Accordingly Rajesh prayed for the prosecution of P Ws 1 and 2 for giving false evidence under s 193 I P C Rajesh had produced a copy of the Draft Minutes of the Board meeting and also cited certain witnesses in support of his case After considering the matter the Sub Magistrate was satisfied that Rajesh could not have been present at the alleged occurrence on 11th October 1963 at Yercaud and that P Ws 1 and 2 deliberately committed perjury and falsely implicated Rajesh as among the assailants Accordingly the Magistrate proceeded under s 476 Cr P C and filed a complaint against the two P Ws under s 193 I P C The witnesses contended that the complaint was not maintainable in law because the trying Magistrate had not followed the procedure under s 479 A Cr P C and it was therefore not open to the Magistrate to take recourse to the provisions of s 476 Cr P C The Magistrate accepted the objection and discharged the accused holding that the complaint was not sustainable because of the bar of sub s (6) of s 479 A Cr P C On revision the Madras High Court set aside the order of the Magistrate and directed that the trial should proceed

Thereupon the two P Ws went up in appeal to the Supreme Court by special leave

The question of law which arose in this case before the Supreme Court was—What was the true meaning and scope of s 476 Cr P C in the context of s 479 A (1) and (6) Cr P C with regard to a prosecution authorised by a Court in respect of an offence of perjury committed before it in the course of the trial. It was pointed out by their Lordships that the necessary condition for the application of s 479 A Cr P C was that *the Court* before it delivers its judgment or at any rate at the time of delivering the judgment *must form an opinion that a particular witness or witnesses, is or are giving false evidence if the Court could not form any opinion about the falsity of the evidence of the witness appearing before it* then certainly the Court cannot at the time of delivering its judgment record any finding about the same It is manifest that a Court can come to a conclusion that a witness is false only when there are materials placed before it to justify that opinion If no materials are placed before the Court to enable the Court to form an opinion that a witness is giving false evidence then certainly it could not form that opinion In the present case the respondent produced material before the trial Court on 23rd December 1963 after the conclusion of the trial that the petitioners had given false evidence in the case and the respondent produced the necessary documents along with an application for proceeding against the petitioners under s 476 Cr P C It is therefore manifest that at the time when the judgment was delivered the Magistrate had no material before him to form an opinion that the petitioners had given false evidence It is therefore clear that s 479-A will not be applicable on the facts of this case and if the provisions of s 479 A will not apply on the

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facts of this case it follows that the bar contemplated by cl (b) of that section will not be applicable The reason is that cl (b) can be invoked only in cases in which s 479 A (1) will be applicable

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KAPUR J

Applying the principle in the present case we are of opinion that the prosecution of the petitioners under the provisions of s 476 Cr P C by the Magistrate after the conclusion of the trial is legally valid and is not affected by the bar of cl (b) of s 479 A Cr P C The italicised are mine

From the italicised portion of the above quotation it is quite clear that before s 479 A can apply it is incumbent on the Court to form an opinion that a particular witness appearing before it gave false evidence It is therefore absolutely essential that the witness in question must appear in person before the Court concerned in order to enable it to form an opinion about the falsity of his evidence *inter alia* by watching his demeanour If the person had not actually entered the witness box but had merely tendered his affidavit it may not in certain cases be possible for the Court to form an opinion about the falsity of his statement In the instant case Parshottamchari had only filed his affidavit but had never appeared before the High Court as a witness hence the procedure laid down in s 479 A Cr P C has no application here It would be governed by s 476 Cr P C

It is also noteworthy that at the time when MATHUR, J disposed of the two revisions by his judgment dated 16th December 1965 the report of the Magistrate, dated 29th July 1965 the opinion of the Civil Surgeon and the testimony of witnesses to the effect that Gopalji was not a lunatic or insane were not before MATHUR, J This is evident from the report of the office dated 1st March 1967 saying that by inadvertance a report from the Sub Divisional Magistrate was

[illegible]
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not called for, not received in the office That is why MATHUR, J could not have formed any opinion as to the falsity of the allegation of Parshottamchari that Gopalji had become a lunatic and insane Nevertheless in response to the notice issued to him to show cause why a complaint under s 193 I P C should not be filed against him Parshottamchari has now filed a reply on 27th February 1967 reiterating his statement that Gopalji had become insane and was kept confined at *Dharam Sangh*, Delhi and was under treatment there for about 6 months It is also admitted by his counsel, Mr *V K S Chaudhry*, that when the enquiry about the alleged insanity was being made Gopalji had appeared before the Magistrate on various dates, that the parties had led evidence in support of their respective allegations that the Civil Surgeon had certified Gopalji to be absolutely sane and that after personally observing Gopalji on various dates the Magistrate had found that Gopalji was not insane and that the opposite party had taken recourse to set up a case of insanity of Gopalji in order to enter the *Math* surreptitiously by the back door As pointed out by their Lordships of the Supreme Court in *Goundan's* case (1) all that was material to prove the falsity of Parshottamachari's allegation of insanity against Gopalji was not available before MATHUR, J at the time of final disposal of the two revisions in question on 16th December, 1965

I am, therefore, of the opinion that the instant case is not covered by cls (1) and (6) of s 479 A Cr P C and that the only section applicable to the present case is s 476, Cr P C

I am not at all satisfied with the explanation of the opposite party, Parshottamchari, filed on 27th February, 1967 He appears to have sworn a false affidavit, to his personal knowledge, that Gopalji had become insane and rendered incapable to manage the *Math*

(1) AIR 1966 S C 1868

property This is wholly belied by the oral evidence produced on behalf of Gopalji the certificate of the Civil Surgeon and the finding of the Sub Divisional Magistrate based on personal observation Parshottam chari being 54 years of age is a fully mature person and represents himself to be belonging to holy order Even while putting his signatures he described himself as Sri Swami Parshottamchari Persons belonging to such a holy order are held in high esteem by the people of India, for their moral excellence If they speak lies and fabricate false evidence, it would have very demo ralising influence on the people in general I, there fore consider it expedient in the interest of justice that he should be proceeded against for perjury Accord ingly I direct that the Registrar of this Court would file a complaint against the opposite party, Parshottam chari under s 193/199, I P C for having sworn and filed a false affidavit in this Court

Ordered accordingly

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APPELLATE CIVIL

Before Mr. Justice Kaul

DAMRI LAL — APPELLANT

v

SARABJIT — RESPONDENT

Banaras State Tenancy Act, *III of 1949 s. 154—Stay of application or proceeding under—Whether extends to a compromise or compromise decree passed in the same—Judgments and Decrees or Orders passed in ignorance of stay of proceedings by or under a statute—Whether void and a nullity*

The notification no. 1193 A 14—467 20 dated 8th October 1965 staying applications and proceedings under s 154 of the Banaras State Tenancy Act does not cover compromise or compromise decree in proceedings under that section and the same cannot as such be said or declared to be void or a nullity

Obiter—Judgments and Orders or Decrees passed by a court in ignorance of stay of proceedings by a statute or rule or order made thereunder would be void and a nullity

Correctness of the contrary view in *Lakhpat Singh* v *Dalpat Singh* (1 and in *Bahadur* v *Bachai* (2) doubted

L Parsotam Saran v *B Brahma Nand* (3) and *Mulraj* v *Murti Raghunathji Maharaj* (4) distinguished on the ground of their being stay orders passed by a court of law which may not operate till known and which cannot be extended to Statutes taking effect from the date provided or of publication irrespective of actual knowledge

Case law discussed

Second Appeal No 4447 of 1961 against the Judgment and Decree of Banwari Lal Goel Civil and Sessions Judge Gyanpur, Varanasi, in Civil Appeal No 102 of 1958, decided on 20th July, 1961

G P Bhargava, for the Appellant

S C Srivastava, for the Respondent

(1) 1964 A L J 1094
(2) A I R 1957 All 401
(3) 1962 A L J 817
(4) S C Notes Vol IX no 7

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KIRTY, J —This appeal by the defendant arises out of a suit filed by the plaintiff for a declaration that the compromise and the decree in suit no 46 of 1955 are null and void and not binding upon him The suit was dismissed by the trial court but has been decreed by the lower appellate court

The compromise and the compromise decree were attacked by the plaintiff on the ground that they had been obtained by the defendant by practising fraud upon him The trial court as well as the lower appellate court came to the conclusion that no fraud had been practised by the defendant as alleged and that the plaintiff had voluntarily entered into the compromise with the defendant It was further held that the compromise in question was valid and legal and was not liable to be set aside on the grounds alleged by the plaintiff

The lower appellate court however held that on the date when the compromise decree was passed namely 4th November 1955 the court concerned had no jurisdiction to take any proceedings as under a notification no 5193 A/IA—467 50 dated 28th September 1955 suits under s 154 of the Binaras State Tenancy Act had been stayed This notification was published in the *Uttar Pradesh Gazette*, on 8th October 1955 The compromise in question was entered into on 1st October 1955 but the compromise decree was passed on 4th November 1955 at a time when the aforesaid notification had become operative The lower appellate court was of the opinion that the decree passed on 4th November 1955 was without jurisdiction and therefore it held that suit no 46 of 1955 in the Court of the Sub Divisional Officer, Gyanpur shall be deemed to be pending

Mr G *P Bhargava*, learned counsel for the appellant, has argued that the view taken by the lower appel

late court is clearly erroneous in law According to Mr *Bhargava* the notification in question did not in any way affect or take away the inherent jurisdiction of the Court of the Sub Divisional Officer Gyanpur He argued that the Sub Divisional Officer cannot be said to have acted without jurisdiction At the most he can be said to have acted with material irregularity and therefore the compromise decree dated 4th November 1955 could not have been declared to be without jurisdiction and a nullity Mr *Bhargava* further contended that no such objection was raised by the plaintiff himself as will appear from the plaint and judgment of the trial court It does not appear from the judgment of the lower appellate court that either the Sub Divisional Officer Gyanpur or the plaintiff or the defendant was aware of the notification dated 28th September 1955 Mr *Bhargava's* contention therefore is that the decree dated 4th November 1955 which was passed by the Sub Divisional Officer at a time when the notification dated 28th September, 1955 had not been brought to his knowledge, cannot be treated as a decree passed without jurisdiction and a nullity He argued that the notification by which proceedings were stayed could only take effect when it was actually communicated to or brought to the knowledge of the court concerned He relied on the case *Lakhpat Singh* v *Dalpat Singh* (1) in which an earlier case *Bahadur* v *Bachai* (2) was considered Mr *Bhargava* also relied on the Full Bench case of *L Parshotam Saran* v *B Barhma Nand* (3) and further submitted that according to the latest pronouncement of the Supreme Court in the case of *Mulraj* v *Murti Raghunathji Maharaj* (4) decided on 2nd March, 1967, the jurisdiction of a court to continue proceedings remains un

(1) 1964 A L J 1094 (2) 1969 A L J 817
(3) A I R 1967 All 401 (4) S C Notes Vol IX no 7 dated 1st April 1967

affected so long as a stay order passed by a superior authority is not communicated to it The Supreme Court case referred to above has not yet been reported in any law reports but a brief report of the same has been published

The case of *Bahadur* v *Bachai* (1) related to the provisions contained in the U P Consolidation of Holdings Act Under s 5 of the U P Consolidation of Holdings Act certain proceedings and suits including appeals were required to be stayed on a notification under s 4 of the Act being issued in respect of the area in which the plots involved in the suit or the proceedings lay S 5 further required the case or the proceedings or the suit to be ultimately decided in accordance with the decision of the consolidation authorities In *Bahadur v Bachai* (1) a second appeal was decided on merits by a Bench of this Court on 17th August 1961 At that time the fact that a notification under s 4 of the Act had already been issued which covered the plots in dispute was not brought to the knowledge of the court An application subsequently was filed on 29th November 1961 for review of the judgment dated 17th August 1961 on the ground that on that date a notification under s 4 had already been issued in consequence of which s 5 of the Act had become applicable to the case The Division Bench which had decided the second appeal and before which the review application had come up for hearing held that although their judgment might not be a nullity yet in view of provisions of s 5(*b*)(i) the second appeal could not have been heard and decided on merits on 17th August 1961 The Bench therefore held that at any rate the judgment dated 17th August 1961 was liable to be reviewed and recalled In the result the review application was allowed and the judgment and

(1) 1969 A L J 817

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decree of the High Court dated 17th August 1961 were recalled and second appeal no 1396 of 1956 was declared to be pending and was ordered to remain stayed In *Lakhpat Singh* v *Dalpat Singh* (1) first appeal no 273 of 1947 was decided on 16th July 1959 by SRIVASTAVA J A notification under s 4 of the U P Consolidation of Holdings Act in regard to the plots involved in the appeal had been published in the *Uttar Pradesh Gazette* dated 14th February 1959 A special appeal was filed against the judgment of SRIVASTAVA, J dated 16th July 1959 *inter alia* on the ground that on that date the notification under s 4 having already been published no decision on merits could have been given and the hearing of the appeal was liable to be stayed This case was also decided by a Division Bench and on behalf of the appellant reliance was placed on the case of *Bahadur* v *Bachai* (2) The learned Judges came to the conclusion that the judgment dated 16th July 1959 which was passed in ignorance of the fact that a notification under s 4 of the Consolidation of Holdings Act had been published would not be a nullity but it would be a case of the court acting with material irregularity in the exercise of its jurisdiction The learned Judges, however allowed the special appeal and set aside the judgment of the learned Single Judge dated 16th July 1959, and remanded the case for disposal in accordance with law The net result of allowing the special appeal was that first appeal no 273 of 1947 was to remain pending but stayed, to be ultimately decided in accordance with the decision of the consolidation authorities

In my opinion, therefore the decision in the case of *Lakhpat Singh* v *Dalpat Singh* (1) does not really help Mr *Bhargava* I have already mentioned that in the earlier case of *Bahadur* v *Bachai* (2) also the Division

(1) 1964 A L J 1004 (2) 1962 A L J 817

Bench did not hold that the judgment and decree passed in ignorance of the notification under s 4 of the U P Consolidation of Holdings Act would be a nullity but all the same they were recalled If the case were to be decided on the basis of the principle laid down in these two cases the judgment of the lower appellate court could not perhaps be interfered with inasmuch as in substance it has followed the same course The facts of the present case however are essentially different from the facts of aforesaid two cases

In the two Allahabad cases referred to above the matter did not arise out of a fresh suit challenging the decree passed in ignorance of publication of notification under s 4 of the U P Consolidation of Holdings Act The matter was raised in one case by a review petition and in the other case by a special appeal In effect therefore it was the same court which had passed the decree or the appellate court which had the same powers as the court which had passed the decree had to deal with the matter Therefore in either case there could be no difficulty, provided appropriate ground was made out in recalling the judgment or the decree passed in ignorance of the notification under s 4 of the Act In the instant case the Sub Divisional Officer Gyanpur had passed the compromise decree in ignorance of notification dated 28th September, 1955, by which suits and proceedings under s 154 of the Benaras State Tenancy Act had been stayed That decree has been sought to be got declared as being without jurisdiction and a nullity by the plaintiff by filing a separate suit in the civil court Therefore applying the principles laid down in the two Allahabad cases can it be said that the decree passed by the Sub Divisional Officer Gyanpur is liable to be set aside or declared a nullity by the Civil Court According to the view taken in those cases the decree was not a

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nullity nor without jurisdiction At the worst it may be said that the Sub Divisional Officer had acted with material irregularity in the exercise of his jurisdiction This being the position the decree dated 4th November 1955 could not be declared to be nullity by the civil court The Sub Divisional Officer who had passed the decree in ignorance of the notification dated 28th September, 1955 might have on an appropriate application being made recalled the decree which he had passed But in my opinion it was not legally open to the plaintiff to file a fresh suit in the civil court to get the said decree declared a nullity nor was it open to the civil court to declare it to be so If the civil court has done so, I think, it has clearly committed an error of law and also has acted in excess of its jurisdiction

The other two cases referred to by Mr *Bhargava* namely *L. Parsottam Saran* v *B Brahma Nand* (1) and *Mulraj* v *Murti Raghunathji Maharaj* (2) may not be of much help in deciding the present case They are cases in which the question which fell for consideration was the effect of an order passed by a subordinate court in ignorance of a stay order passed by a superior court It was laid down in the Full Bench case of *L Parshottam Saran* v *B Brahma Nand* (1) that a sale held by the executing court in ignorance of the stay order of the superior court would not be a nullity, but would be valid and effective The Supreme Court, by the recent decision noted above, has now set at rest the controversy on this point in the various High Courts The Supreme Court case also only lays down that a stay order passed by a superior court becomes operative only upon its being communicated to the subordinate court and that any order passed by the subordi

(1) A I R 1937 All 401 (2) S C Notes Vol IX no 7 dated 1st April 1967

nate court in ignorance of the stay order of the superior court will not be invalid

In my opinion however cases of orders passed by superior courts staying proceedings in subordinate courts are different from cases where either hearing of suits or continuance of proceedings are stayed under some statutory provision statutory rule or statutory order In my opinion in such cases the statute the statutory rule or the statutory order must be accepted as having become operative with immediate effect The operation or the effectiveness of statutes statutory rules and statutory orders cannot be made dependent on the knowledge of the particular court or authority or litigants about it If this were allowed the result would be chaotic It would then be open to various courts or authorities to proceed with cases or proceedings in spite of the statute the statutory rule or the statutory order, and subsequently to uphold their action on the ground of ignorance or absence of knowledge In my opinion any provision either in a statute or in a statutory rule or in a statutory order staying proceedings must necessarily take effect as soon as they come into force like all statutes statutory rules and statutory orders No exception can be made in regard to statutes statutory rules or statutory orders staying proceedings or hearing of suits if, therefore this be the legal position and, in my opinion this is the legal position—the notification dated 28th September 1955 became immediately operative on being published and the Sub Divisional Officer Gyanpur was bound by it whether he had knowledge of the same or not Therefore if the passing of the compromise decree was also prohibited by the said notification the decree passed on 4th November, 1955 would be a decree without jurisdiction and a nullity

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and it would be legally open to the civil court to declare it to be so

I am aware that the view I have expressed in the preceding paragraph runs counter to the decision reported in *Bahadur* v *Bachan* (1) and *Lakhpat Singh* v *Dalpat Singh* (2) I am also aware that those cases were decided by Division Benches and that I am bound by the same Therefore if this appeal were to be decided only on the basis of the legal view expressed in those two cases I would have followed and applied the same and disposed of the appeal holding that the decree dated 4th November, 1955 was not a nullity nor was it without jurisdiction In fact by applying the principles laid down in these cases I have already earlier in the judgment, held that it was not legally open to the civil court to decree the plaintiff's suit because the decree dated 4th November 1955 could not said to be a nullity or without jurisdiction There is however another ground on which the appeal can be decided without even having to rely on the two cases of our High Court which I have referred to above

The notification dated 29th August 1955 was published in the *Uttar Pradesh Gazette*, on 8th October 1955 The relevant portion of the notification published in the *Uttar Pradesh Gazette*, dated 8th October 1955, which is also to be found at p 120, Part V of 1955, Allahabad Law Times, reads as under —

> In exercise of the powers conferred the Governor is pleased to declare that the applications and proceedings under s 154 of the Benaras State Tenancy Act (Act III of 1949) shall remain stayed

To my mind by this notification only applications and proceedings under s 154 of the Benaras State Tenancy Act had been stayed That is to say, the courts or the

(1) 1962 A L J 817 (2) 1964 A L J 1094

authorities concerned were required to stay their hands and not to give any decision on merits on such applications or in such proceedings The notification did not prohibit any compromise being entered into by the parties concerned with the application or the proceeding Any such compromise arrived at between the parties would be binding on them and would also be legally enforceable If the compromise was otherwise legally valid then it did not really require any order of the court to make it effective and binding It was only because some application or proceeding was pending and the parties did not want such application or proceeding to be decided on merits having arrived at an amicable settlement that it had become necessary to make an application for recording the compromise and passing a decree in terms thereof The application for recording the compromise and passing a decree in terms thereof certainly was occasioned by the fact that an application or proceeding under s 154 of the Benaras State Tenancy Act was pending in the Court of the Sub Divisional Officer Gyanpur but the application neither was nor could be said to be an application or a proceeding under s 154 of the Benaras State Tenancy Act The Sub Divisional Officer had merely to see as to whether the compromise was in accordance with law and if he was satisfied on this point then it was incumbent on him to record the compromise and to pass a decree in terms thereof By recording the compromise and passing a decree in terms thereof the Sub Divisional Officer Gyanpur in my opinion did not continue the application or the proceeding between the parties under s 154 of the Benaras State Tenancy Act which was pending in his court What he did was not in my opinion prohibited under the notification dated 28th September 1955 nor did he by recording the compromise and passing the com

promise decree nitrinse the order dated 20th August 1959 In my opinion therefore the order recording the compromise and the compromise decree passed by the Sub Divisional Officer Gyanpur could not be assailed by filing a suit in the civil court on the ground that they were nullity and without jurisdiction The suit of the plaintiff therefore could not be decreed and the lower appellate court in decreeing the suit committed a clear error of law The decree of the lower appellate court is liable to be set aside on this ground alone and it would not have been really necessary for me to have considered any other point and given decision thereon Since however strong reliance was placed by Mr *Bhargava* on the four cases referred to earlier in the judgment I thought it proper to deal with them also while dealing with these cases as mentioned earlier in the judgment I also ventured to express my own opinion which is not consistent with the view taken therein It might not have been necessary for me to express my personal view in the matter but since I failed to persuade myself to agree with the view taken in these cases I could not avoid expressing my opinion and doubts in regard to the correctness of the legal propositions laid down therein

The appeal therefore is allowed the decree of the lower appellate court is set aside and that of the trial court is restored with costs throughout

Appeal allowed

APPELLATE CIVIL

Before Hon'ble Beg, the Chief Justice and Mr. Justice Dwivedi

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May 18

SYNTHETICS AND CHEMICALS Ltd. FATEHGANJ WEST BAREILLY ..... APPELLANT

v.

G. C. KUMAR AND OTHERS ..... RESPONDENTS

Constitution of India, Art. 226—Mandamus—Mandamus *if can issue to a trading corporation—Duty of public nature—Office of public nature—Meaning and import of—Nature of the office of Labour Welfare Officer—Specific Relief Act 1877 s. 45*

Art. 226 of the Constitution is very wide and empowers High Courts to issue a writ to any person which word includes a company registered under the Companies Act. A High Court is empowered to issue not only well known pre rogative writs but also to issue any order or direction according to the neces sities of a case. *Mandamus* may issue to a trading corporat on to compel it to do its duty which is of a public nature and to restore a person to a corporate office if the office is of a public nature.

A duty is of public nature if it is imposed by Charter Com mon law or statute.

The office is of public nature if it is created by a statute and the duties of the office affect the general public or a sec tion thereof.

The office of the Labour Welfare Officer is a public office.

Special Appeal No. 14 of 1967 against the order of OAK, J. in Writ Petition No. 679 of 1965 decided on 19th January 1967.

The following judgment of the Court was delivered by :—

DWIVEDI, J.—The appellant is, it has been stated before us by counsel for the appellant, a public com

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Dwivedi J

pany registered under the Companies Act It has filed this appeal against the judgment of Sri Justice Oak allowing the writ petition of G C Kumar the first respondent

The facts of the case with the exception of one of them are undisputed In July 1962 G C Kumar was employed as a Labour Welfare Officer in the Associated Stone Industries Kotah Ltd Ramganj Mandi Rajasthan On July 9 1962 the appellant employed him in its Industrial Relations Personnel Department on six months probation On 10th December 1962 he was appointed Labour Welfare Officer There were two three monthly extensions of his probation once in January and then in March 1963 On the expiry of the second extension no order confirming him on the post was made

One B K Shukla an Inspector of Factories inspected the factory of the appellant His inspection report dated 7th November, 1963 pointed out that G C Kumar does not possess the requisite qualifications prescribed by r 9 of the Factory Welfare Officers Rules This report set in motion an enquiry about his qualification

By letter dated 24th February 1964 the Chief Inspector of Factories U P informed the appellant that G C Kumar "does not fulfil the qualifications of r 9(*d*) of the U P Factories Welfare Officers Rules 1955 Thereafter by letter dated 17th April 1964 the appellant terminated the service of G C Kumar G C Kumar made a representation to the Government which was rejected on 30th November 1964

G C Kumar then filed a writ petition in this Court He prayed for the following reliefs in the petition

(1) A writ in the nature of *mandamus* or any other writ, order or direction commanding the

State Government to set aside the order of the appellant dated 17th April 1964 and commanding the appellant to reinstate him to his post with back pay

(2) A writ in the nature of *certiorari* or any other writ order or direction for quashing the order of the State Government dated 30th November 1964

(3) A writ order or direction to the appellant directing it to keep him in its employment and not to give effect to its order dated 17th April 1964

The petition was allowed by Sri Justice Oak. The appellant was directed not to give effect to the order of discharge dated 17th April 1964. The order of the State Government dated 30th November 1964 was quashed.

The State Government has not filed any appeal. Sri *Sorabji*, counsel for the appellant has urged before us the following points:

(1) The Court cannot issue a writ in the nature of *mandamus* or any other writ order or direction to the appellant which is a trading corporation and not a public body.

(2) No relief can be granted to G. C. Kumar as he was not qualified to be a Labour Welfare Officer. He has no legal right to the post.

(3) The order dated 17th April does not cast a stigma on G. C. Kumar and does not punish him. It was made in exercise of the contractual right to terminate service.

(4) In any case this Court cannot direct the reinstatement of G. C. Kumar to the post of Labour Welfare Officer.

The last argument may soon be disposed of Sri Justice Oak has not directed the appellant to reinstate G C Kumar The learned Judge has directed the appellant not to give effect to the order of discharge Such an order can be made under Art 226 of the Constitution The order does not compel the appellant to take work from G C Kumar Of course it will entail the payment of his salary to him

We shall now take up the third point The order terminating the service of G C Kumar was made by the appellant on 17th April 1964 The pertinent portion of the order is as follows

> We regret to advise you that since your services were not found satisfactory we were unable to confirm you You had also been given an opportunity to act as Labour Welfare Officer but due to the State Government not accepting your qualifications it was not possible to continue you in that capacity
>
> As your services have not been satisfactory please be advised that your services will no longer be required by us Accordingly we hereby terminate your services

It is admitted by counsel for the appellant that G C Kumar was the Labour Welfare Officer on probation when his service was terminated R 11 of the Welfare Officers Rules provides for the discharge from service of a Labour Welfare Officer if his work has not been satisfactory R 15 provides for his punishment The first proviso to r 11 contains an important safeguard for the Labour Welfare Officer It provides that his service shall not be terminated without the written concurrence of the Labour Commissioner, who shall record his reasons therefor R 15 sets out several kinds of

punishments including dismissal or termination of service in any other manner R 15 contains two provisos The first proviso ensures a hearing to the Labour Welfare Officer before he may be punished The second proviso enjoins on the employer not to impose any punishment on him except censure without the previous concurrence of the Labour Commissioner

The concurrence of the Labour Commissioner with the order of termination of service of the Labour Welfare Officer is a common feature of rr 11 and 15 It is admitted by counsel for the appellant that the concurrence of the Labour Commissioner with the order terminating the service of G C Kumar has not been obtained So the order is in contravention of rr 11 and 15 It cannot be gainsaid that r 11 would in any case apply to the order as G C Kumar was on probation at the time of his discharge from service Accordingly we are of opinion that the order is invalid In the result it is not necessary to decide that the order does not impose a punishment as it does not cast a stigma on G C Kumar

We shall now take up the first point Counsel for the appellant has maintained that a *mandamus* has never been issued to a trading corporation This broad argument is we apprehend not borne out by the history of *mandamus* in England According to Blackstone [Blackstone s Commentaries on the Laws of England by George Koase (IV Sdn)] *mandamus* is directed to any person or corporation requiring him or it to do some particular thing, which appertains to his or its office and duty A *mandamus* lies to compel the admission or restoration of the party applying to any office or franchise of a public nature

Tapping mentions cases where a *mandamus* has been issued by the English courts to companies to enforce

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Dr. Vedi J.

courts imposed by charter or statute During High Prerogative writ of Mandamus pp 82 to 84 The writ has been refused to command restoration to the place of a clerk of a company as of the Company of Butchers of London although it be an office instituted by charter and a freehold for it is not a public office but a private one for which a *mandamus* does not lie from a review however of the older cases it would seem that the *mandamus* should have been granted for it has been said that the writ has been granted for clerks of private companies since *Lord Holt's* time So in White's case— — — — it is stated that the *mandamus* was granted the court there alleging as the ground of its judgment that it was the same case with that of a town clerk

According to *Halsbury's Laws of England* (1) *mandamus* issues to any person or corporation to do what appertains to his or their office and is in the nature of a public duty In particular *mandamus* will lie to restore admit or elect to an office of a public nature for the delivery up production and inspection of public documents to endorse statutory rights and duties — — — — (2) An order of *mandamus* is granted for doing that which a statute obliges to be done and for this rule to apply it is not necessary that the party or corporation on whom the statutory duty is imposed should be a public official or an official body (3)

In *The King v The Severn & Wye Railway Co* (4) *mandamus* was issued to the Railway Company to reinstate and lay down again a railway In *The Queen v The Government Stock Investment Co Ltd* (5) the Investment Company was registered under the Companies Act 1862 A person claimed to have been elect

(1) Halsbury's Laws of England (3rd Edn) Vol 11 page 84
(2) Ibid at page 86 (3) Ibid at page 90
(4) (1910) 106 S R 561 See also (1909) 60 L T (N S) 972 Reg v Q W R Co at page 575 (5) (1868) 3 Q B D 412 See also (1867) 5 Q B 925—The Queen v Hampton Brough Wright and Hibbins.

ed as a director by show of hands *Mandamus* was issued to institute him into office

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In *The King* v *Lear* (1) Holroyd J said

> In *Comm Dig Mandamus* (A) it is stated that the writ of *mandamus* is granted to prevent failure of justice and for the execution of the common law or of a statute or of the King's Charter but not as a private remedy to the party

In *Ex parte Robins* (2) Patteson J said

> A *mandamus* if granted at all must be to do something which the company are required to do by the act of Parliament nor something which they are required to do by the general law of the land

In the U S A a private domestic corporation is subject to judicial control by a writ of *mandamus*——— This is so because the corporation is the recipient of a franchise from the State and is subject to its visitational power (3) It is also said that *mandamus* lies to seat a person entitled to a corporate office where his title there to has been adjudicated or is clear or undisputed (4)

According to Ferris (5) private domestic corporations are subject to the writ of *mandamus* and they may be compelled to perform an act which the law specifically enjoins as a duty *Mandamus* may be issued to them not only for the performance of public duties but also for the enforcement of private rights Ferris goes on to say

> *Mandamus* is the proper remedy to prevent further illegal exclusion from office in a private corporation when the right thereto is clear — — — (6)

S 45 of the Specific Relief Act empowered the Presidency High Courts to make an order which was of

(1) (1830) 3 B and C 899 (2) (1838) 7 Dowling 196
(3) Corpus Juris Secundum Vol 55 page 426
(4) Ibid Vol 55 page 427 (5) Ferris Extraordinary Legal Remedies p
(6) Ferris Ibid p

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the nature of *mandamus* to a corporation requiring any specific act to be done or forborne provided that such doing or forbearing was under any law for the time being in force clearly incumbent on such corporation in its corporate character Art 226 of the Constitution is very wide and empowers High Court to issue a writ to any person which word includes a company registered under the Companies Act A High Court is empowered to issue not only the well known prerogative writs but also to issue any order writ or direction according to the necessities of a case

In *In re Albert Mills Co Ltd* (1) the Bombay High Court issued an order to enforce the right of an elected director to act as a director

In the *Bank of Bombay* v *Suleman Somji* (2) the plaintiff instituted a suit for a declaration that he was entitled to inspect the register of shareholders and copy and take extracts from the said register and for an order that the Bank should give him such inspection and allow such copies and extracts The suit was decreed by the Bombay High Court In appeal the Privy Council set aside the decree and dismissed the suit for the reason that the plaintiff was not asking for inspection and copies in self interest The Privy Council said that the suit was of the nature of an application for a writ of *mandamus* and that the principles regulating the issue of *mandamus* should govern the making of a decree in the suit It was further said that the right of inspection is not founded on any statute but on the common law which gives a right of inspection to every member of a corporation if it is necessary in his self interest

This case suggests that *mandamus* may issue to a trading corporation in certain cases

(1) 9 Bom H C R 458 (2) I L R (1908) 32 B 466

In *L S Lalwani v N M Shah* (1) the Supreme Court said The Chief function of the writ (*mandamus*) is to compel the performance of public duties prescribed by statute

What is an office of a public nature? In *Derby v The Queen* (2) TINDAL, C J said that *quo warranto* may issue for usurping any office whether created by charter alone or by the crown with the consent of Parliament provided the office be of a public nature and a substantive office In *The Queen v The Guardians of the Poor of St Martins* (3) Lord Campbell said that *quo Warranto* will issue if it be an office in which the public have an interest According to PATTESON, J the duties of an office are of a public nature if the exercise of them affects a great body of persons (4) In *In the matter of G A Nateson* (5) it was held that a public office means any office created by a statute for discharging functions which affect the public generally or any particular section thereof

We believe that this discussion of the case law would be incomplete if we do not mention two more decisions which would show that the writ of *mandamus* is not past judicial adaptation to the needs of our country In *Rochester Corporation v Regina* (6) MARTIN, B Said

> Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment we think it our duty to be vigilant to apply it in every case to which by any reasonable construction it can be made applicable

(1) A I R 1966 S C 334
(2) (1848) 12 Cl & F 520 at p 541
(3) (1851) 17 Q B 149 at p 160
(4) Ibid at page 162
(5) I L R 40 Mad 180
(6) (1858) E B & E 1024 at p 1038

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District J

In *T. C. Basappa* v. *T. Nagappa* (1) the Supreme Court observed: "The language used in Arts. 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to the issuing of orders, writs or directions including writs in the nature of *habeas corpus, mandamus quo warranto* prohibition and *certiorari* as may be considered necessary for enforcement of fundamental rights and in the case of High Courts for any other purpose as well. In view of the express provisions in our Constitution we need not now look back to the early history of the procedural technicalities of these writs in English law nor feel oppressed by any difference of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English Law."

From this review of the authorities and laws there emerge the following principles:

(1) *Mandamus* may issue to a trading corporation to compel it to do its duty which is of a public nature.

(2) A duty is of a public nature if it is imposed by charter, common law or statute.

(3) *Mandamus* may issue to restore a person to a corporate office if the office is of a public nature.

(4) The office is of a public nature if it is created by a statute and the duties of the office affect the general public or a section thereof.

(5) Art. 226 empowers the High Court to issue a writ *in the nature* of *mandamus*. The power may be exercised keeping in regard the broad and

(1) (1954) 1 S.C.R. 290 at page 298.

fundamental principle which underlies the issue of *mandamus*

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Dave, J.

We shall examine the present case in the light of these principles. For this purpose it is necessary to notice certain provisions of the Factories Act and the U. P. Factories Welfare Officer Rules 1950.

The Factories Act (hereinafter called the Act) is a humanitarian measure. It has been enacted for protecting the health, safety and welfare of the persons in factories. S. 2(n) defines an occupier as the person who has the ultimate control over the affairs of the factory. Chap. V of the Act is headed as 'welfare'. It consists of nine sections. Ss. 42 to 48 provide for certain facilities to the labour. Sec. 49 is material to the case. It reads:

> "49. (1) In every factory wherein five hundred or more workers are ordinarily employed the occupier shall employ in the factory such number of welfare officers as may be prescribed.
>
> (2) The State Government may prescribe the duties, qualifications and conditions of service of officers employed under sub-s. (1)."

The U. P. Factories Welfare Officers Rules 1950 have been made by the State Government under the Act. They have accordingly the force of a statute and are to be deemed a part of the Act. R. 8 defines the status of the Labour Welfare Officer. It provides that he shall have the status of an officer of the factory. R. 10 provides that a Labour Welfare Officer shall be appointed on a permanent basis, but he shall initially be placed on one year's probation. His service may be dispensed with by the occupier during or at the end of the period of probation if he has not made sufficient use of his opportunities or if he has not otherwise failed to give satisfaction. Alternatively the probation may be extended by one year. In either

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case there must be the written concurrence of the Labour Commissioner who shall record his reasons therefor This is the effect of r 11 R 12 provides that he shall be confirmed at the end of the period of his probation R 15 provides for various punishments including the punishment of dismissal or termination of service in any other manner No punishment can be imposed upon him unless he has first been informed of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself Again no punishment other than censure shall be awarded without the previous concurrence of the Labour Commissioner The Labour Commissioner shall hear him before giving his concurrence He may appeal to the State Government from the order of dismissal or termination of service R 21 fixes the age of his superannuation at 55 years R 17 enumerates the duties of the Labour Welfare Officer These duties are (1) to promote harmonious relations and act as a Liaison Officer between the workers and the management, (2) to get the grievances and complaints of the workers with regard to their working conditions redressed expeditiously (3) to bring the breaches of labour laws and orders and statutory obligations regarding health, safety and welfare of the workers to the notice of the manager or occupier, and take suitable steps for the provision of amenities such as canteens, shelters for rest creeches adequate latrine facilities drinking water etc and (4) to make representations to the authorities concerned in regard to conditions of roads bridges etc used by labour in proceeding to, and from, their work In short the duties of the Labour Welfare Officer are to ensure the health, safety and welfare of the labour employed in the factory

These provisions show that the post of the Labour Welfare Officer is an office created by the Act The

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office is of a permanent character. It is a substantive office. It is not an office held at mere will. The officer can be discharged only for some cause and with the written concurrence of the Labour Commissioner and after hearing. His duties are of a public nature because they affect the interest of a large number of workers employed in the factory. In the discharge of his duties he has to deal with persons not concerned with the factory. Accordingly the office of the Labour Welfare Officer is a public office and a writ in the nature of *mandamus* can issue to the appellant to restore G. C. Kumar to his office. It necessarily follows that the appellant owes a duty of a public nature to restore him to his office. The duty arises from s. 49 of the Act and the Factories Welfare Officers Rules.

Counsel for the appellant has relied on certain cases in support of his argument that a *mandamus* has never issued to a trading corporation. These cases are *P. K. Pillai* v. *Burmah Shell Oil Storage & Distributing Co.* (1); *Food & I. & R. Ananthalwar* v. *Kaleswaram Mills, Ltd.* (2); *Sohan Lal* v. *Union of India* (3); *Ram Kishan* v. *Central Bank of India Ltd.* (4); *In re U. S. Hanumanthan* (5); *M. Durgaiah* v. *Agent Tindivanam Collieries* (6); *S. P. Saxena* v. *Manager, A. R. Higher Secondary School* (7); *L. S. Lakwani* v. *V. M. Shah* (8); and *R. Lakshmi* v. *Neyveli Lignite Corporation* (9). But all these cases are patently distinguishable for in none of them there was cast on the private individual or corporation a duty by a statute nor was the office a public office.

It may be noted that the order of termination of service comes here buttressed by the opinion of the Chief Inspector of Factories and the State Government that

(1) A.I.R. 1956 Kutch 9
(2) A.I.R. 1957 M. 309
(3) 1958 S.C.R. 738
(4) A.I.R. 1958 A. 413
(5) A.I.R. 1960 A. P. 518
(6) A.I.R. 1961 A. P. 400
(7) A.I.R. 1961 A. 282
(8) A.I.R. 1966 S.C. 334
(9) A.I.R. 1966 M. 399

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G. C. Kumar does not hold the requisite academic qualification and by the direction of the former that G. C. Kumar should soon be replaced by a duly qualified person. The appellant removed G. C. Kumar on account of the direction of the Chief Inspector of Factories. This gives to the impugned order of termination of service a quasi governmental colour. In these circumstances it is a fit case where a writ order or direction should issue under Art. 226.

We shall now deal with the second argument of the appellant. R. 9 of the Factories Welfare Officers Rules prescribes the age and qualifications of the Labour Welfare Officer. The case of the appellant is that G. C. Kumar does not possess the qualification prescribed by r. 9(*d*). The case of G. C. Kumar is that he possesses the said qualification.

R. 9(*d*) lays down that no person may be appointed as a Labour Welfare Officer unless he possesses a degree in Economics or Sociology of a University established by law.

It is admitted by G. C. Kumar that he holds the degree of B. Sc. (Agriculture) with Agricultural Economics as one of his subjects. It is said by him that there is no difference between Agricultural Economics which was taught to him in B. Sc. and Economics which is taught in B. A. The supplementary affidavit which he has filed before us includes a copy of the syllabus of Agricultural Economics in B. Sc. (Agriculture). It is common ground between counsel for the parties that a person possessing B. A. degree with Economics fulfils the standard prescribed by r. 9(*d*). The appellant has filed a supplementary affidavit after the close of arguments. This affidavit includes a copy of the syllabus of Economics in B. A. of the Allahabad University. The two syllabii are dissimilar. However, we

are diffident to determine the question raised before us for it requires an expert knowledge of the two subjects We confess that we are not an expert in the two subjects In the result we are unable to hold that G C Kumar has no legitimate right to the office of the Labour Welfare Officer which he can seek to protect in the writ proceeding

We shall assume for the sake of argument that G C Kumar is not duly qualified to hold the office of the Labour Welfare Officer Even so his appointment to the said office cannot be said to be void *ab initio* The *appointment* of an unqualified person is irregular and not illegal This is evident from a perusal of rr 9 and 13 R 9 consists of the main part and two provisos The main part opens with the phrase no person may be appointed while the second proviso opens with the phrase no person shall be appointed The use of the auxiliary verb may in the main part and the auxiliary verb shall in the second proviso is significant It seems to us that the choice of the two different verbs is deliberate In the main part may is used to indicate the directory nature of the provision in the second proviso shall is used to suggest the imperative character of the second proviso This inference is reinforced by r 13 which enables the State Government to exempt a person from all or any of the qualifications prescribed by r 9 R 9(*d*) the rigour of which may be relaxed in a certain contingency cannot operate as imperative until the request for exemption is denied by the Government [*State of U P* v *Manbodhan Lal* (1) and *K Narasimhiah* v *B C Singri Gowda* (2)] After the rejection of the request for exemption only the further *continuance* in office of the unqualified incumbent will not be legal

(1) 1958 S C R 533 (2) A I R 1966 S C 290

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SWASTIKA AND CHEMICALS LTD. v. G. C. KUMAR

Dhillon J.

In the present case G. C. Kumar applied to the State Government for exemption from the qualification prescribed by *ibid* even though his case was that he was fully qualified. It does not appear from the record before us that any order has been made on this application by the State Government. The application was made after the passing of the order of termination of service. As the application appears to be still pending and as it is not infective in nature in the sense already explained it cannot be successfully urged that the restoration of G. C. Kumar as Labour Welfare Officer would be in the teeth of the provisions of the Act and the rules made thereunder and would expose the appellant to the danger of prosecution and conviction under s. 92 of the Act for retaining G. C. Kumar in service in contravention of the provisions of the Act and the Rules.

In view of the foregoing discussion we are of opinion that the appeal fails and is hereby dismissed with costs payable to G. C. Kumar only.

Appeal dismissed

APPELLATE CIVIL

*Before Mr Justice Jagdish Sahai and Mr Justice J S Trivedi**

RAM CHAND — DEFENDANT APPELLANT,

v

MOTI THAD AND ANOTHER — PLAINTIFFS RESPONDENTS

1961

August 16

Benami Transaction—*Nature and burden of proof—Sale and lease —Difference between*

Resulting Trust—*Defendant was permitted to enjoy the fruits of a lease—Resulting trust not created*

The normal rule is that the deed must be in the absence of evidence to the contrary prevail according to its apparent terms Where an allegation of a *benami* character is made the burden of proof lies on the person alleging the *benami* nature of the transaction Mere probabilities or suspicion are not sufficient to disprove the apparent nature of the transaction The main points necessary to be looked into for finding out whether a particular transaction is *benami* or not are the source of money the possession of property and the title deed and the conduct of parties before and after the execution of the deed Reliance must be placed not only on the surrounding circumstances and the position of the parties and their relation to one another but also upon the motive which could govern their actions and their subsequent conduct

The legal position of lease is different from a sale Whereas in a lease there is a subsisting contract between a lessor and a lessee inasmuch as there are reciprocal rights and liabilities In the case of a sale the vendor disappears from the scene for all times to come once the sale is complete In the case of a lease the performance of reciprocal rights and liabilities continue so long as the lease lasts and it is of absolute necessity that the lessor knows the real lessee in a *benami* transaction for otherwise the real lessee would be relegated to the position of sub lessee

Merely because the defendant was permitted to enjoy the fruits of the lease standing in the name of plaintiffs it cannot be said that there was a resulting trust for the benefit of the defendant

Case law discussed

* While sitting at Lucknow

1967

RAM CHAND v. MOTI LAL

First Civil Appeal No 61 of 1957 against the judgment and decree passed by R Sanehi Civil Judge Lucknow dated 20th May 1967 in Regular Suit No 40 of 1952

The facts appear in the judgment

G *Sarup* for the Appellant

M *Nazruddin* for the Respondent

The following judgment of the Court was delivered by—

TRIVEDI J —This is a defendant s first appeal against the judgment and decree of the learned Civil Judge, Lucknow dated the 20th May 1957 decreeing the plaintiffs suit for ejectment and damages

The plaintiffs respondents came to the Court with the allegations that plaintiff no 2 is the *karta* of the joint Hindu family of which plaintiff no 1 is a member that the plaintiffs father Sri G H Thad obtained from the Rasoolpur estate a lease of the land and building known as Jahangirabad Terrace situate at Hazratganj Lucknow for erecting thereon a cinema hall shops etc which were constructed at a great expense and are now commonly known as Mayfair Buildings in Hazratganj Lucknow, that in the year 1939 he obtained another lease from Rasoolpur estate for a period of 10 years on the monthly rent of Rs 60 in respect of the property adjoining the Mayfair Cinema building towards its east and comprising the shop occupied by Messrs Allied Electric and Radio Corp and the flat above the shops occupied by Messrs Sen and Sansal Akhtar Hair Dresser and Messrs Allied Electric and Radio Corporation that among other terms of the lease the lessee was to spend a sum of Rs 6 000 on repairs and modifications of the leased property that the defendant and the plaintiffs father were very intimate friends and the latter i e the plaintiffs father at

the request of the former i e the defendant permitted the defendant to occupy the leased premises on paying the rent fixed for the said lease that the plaintiffs father died in the year 1944 that in the year 1947 the plaintiffs obtained another lease for 90 years from Rasoolpur estate in respect of the property detailed in para 9 of the plaint which included the property covered by the former lease of 1939 that the position of the defendant since the execution of the lease of 1947 was that of a sub lessee that the plaintiffs desired the defendant to vacate the premises occupied by him and when the defendant did not agree to do so the plaintiffs filed an application before the Rent Control and Eviction Officer for permission under s 3 of the U P Control of Rent and Eviction Act that the defendant denied the title of the plaintiffs and set up his own title before the Rent Control and Eviction Officer the plaintiffs thereupon filed the suit giving rise to this appeal for ejectment and damages

The defendant s case is that there was intimate friendship between him and plaintiff s late father that in the year 1938 39 the premises covered by the lease of 1939 were in an extremely bad state of repairs and had been lying vacant for a long time that on account of his experience as a building contractor the agents of the Rasoolpur estate approached him for renovating the same and making additional constructions the defendant being agreeable negotiations were started, the plaintiff s father out of regard for and being obliged to the defendant for the great sacrifices made and services rendered by the defendant intervened in the negotiations on behalf of and for the benefit of the defendants and ultimately on 22nd December, 1939 the lease of that date was obtained by the plaintiff s father in his name but for the sole benefit of the defendant and the entire expenses in respect of the transaction were paid and provided for by the defendant

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alone It is alleged that the defendant incurred huge sums of money in renovating and reconstructing the premises to the knowledge of the plaintiff's father and the Rasoolpur estate and that in spite of the execution of the lease deed of 1939 negotiations continued between the agents of the Rasoolpur estate on the one hand and the defendant and the plaintiffs father on the other for a long term lease of the entire building and it was eventually agreed that such a lease will be granted In pursuance of the said agreement another lease was obtained in the plaintiff's name from the Rasoolpur estate in 1947 for the entire property This lease deed was executed in continuation of the lease of 1939 for the defendant's benefit and was of the same *benami* character as the earlier lease The defendant has throughout been in continuous and exclusive possession of the premises covered by the lease of 1939 and he alone has fulfilled all the terms of the lease within the knowledge of the owner of the property as well as the plaintiffs father and the plaintiff and the plaintiff is estopped from claiming possession *inter alia* on the ground of acquiescence It is further stated that even if the defendant be held to be a licensee he cannot be ejected as he has incurred enormous expenditure over permanent constructions that the plaintiffs father and after his death the plaintiffs are *benamidars* and there is a resulting trust in favour of the defendant that the plaintiffs in their capacity as some of the heirs of their father are legally not competent to maintain the suit

In their replication the plaintiffs denied that the defendant had incurred huge sums in repairs and reconstruction It was stated that after the execution of the lease of 1947 at the desire of the defendant it was agreed between the parties that the defendant will continue to enjoy the use of the premises covered by

the lease of 22nd December 1949 on payment of Rs 60 per month to the plaintiffs

The suit was tried by the Civil Judge Lucknow who decreed it on 20th May, 1957 for ejectment of the defendant for the recovery of Rs 9 019 12 as damages up to the date of suit for the recovery of Rs 18,757 8 as damages *pendente lite* up to the date of the judgment as also for future damages at the rate of Rs 307 8 per month till the date of ejectment The decree for *pendente lite* and future damages was subject to the payment of court fees The plaintiffs were also awarded cost of the suit and future interest on the decretal amount at the rate of 6 per cent per annum

Mr *Jagdish Swarup*, the learned counsel for the defendant appellant has contended before us (i) that the lease of 1939 in favour of the plaintiffs father and that of 1947 in favour of plaintiff no 2 were *benami* transactions for the defendant, (ii) that the plaintiffs being *benamidars* of the lease of 1939 their position was that of a trustee and the lease of 1947 taken by the trustee enured for the benefit of the defendant and (iii) that even if the lease of 1939 was not *benami* and the position of the defendant was that of a licensee the defendant having made permanent constructions by investing huge sums the licence became irrevocable, and the plaintiffs could not eject the defendant till the subsistence of their lease of 1947

We have been taken through the evidence and the documents on the record

The main point for consideration in the present case is whether the lease of 22nd December 1939 in favour of Sri G H Thad father of the plaintiffs was *benami* for the defendant The normal rule is that the deed must in the absence of evidence to the contrary prevail according to its apparent tenor Where

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an allegation of a *benami* character is made the burden of proof lies on the person alleging the *benami* nature of the transaction Mere probabilities or suspicion are not sufficient to disprove the apparent nature of the transaction The main points necessary to be looked into for finding out whether a particular transaction is *benami* or not are the source of money the possession of property and the title deed and the conduct of parties before and after the execution of the deed

In short, in order to determine whether a person in whose name the conveyance is taken is intended to be taken as an owner or is a mere *benamidar* reliance must be placed not only on the surrounding circumstances and the position of the parties and their relation to one another but also upon the motive which could govern their actions and their subsequent conduct

The legal position of a lease is different from a sale Whereas in a lease there is a subsisting contract between a lessor and a lessee inasmuch as there are reciprocal rights and liabilities in the case of a sale the vendor disappears from the scene for all time to come once the sale is complete In the case of a lease the performance of reciprocal rights and liabilities continue so long as the lease lasts and it is of absolute necessity that the lessor knows the real lessee in a *benami* transaction for otherwise the real lessee would be relegated to the position of sub lessee

According to the case of both the parties the defendant had been in possession of the property leased under the lease of 1939 According to the plaintiffs the possession of the defendant is permissive whereas according to the defendant he was the real lessee The question of possession, therefore, and the evidence relied upon in respect of it is immaterial for determin

ing the real nature of the transaction and we are left with the determination of the real nature of the transaction from the surrounding circumstances In the present case the lease of 1939 was a lease for ten years only Admittedly no premium was paid for the lease The defendant asserts having incurred all the expenses in connection with the execution of the lease He was a big contractor paying income tax He has not filed his accounts in proof of his allegations

The motive for taking the lease of 1939 *benami* in the name of the plaintiffs father as suggested in the deposition of Ram Chandra defendant is that the estate was willing to give the lease in the name of G H Thad the father of the plaintiffs without taking any security whereas in case the lease was taken in his name the estate would have taken security before granting the lease According to the defendant negotiations for the lease started with Irshad and Abdul Wahid agents of Raja Etzad Rasul Ram Chandra D W 1 has stated that Raja s agents raised the question of security as they said that the District Judge as guardian of minor Etzad Rasul will not give permission unless security is there He further says that it was not disclosed to the Raja that the defendant was the real lessee It is admitted by the defendant that Irshad is alive he was even summoned by the defendant as one of his witnesses He was however not produced for reasons best known to the defendant It is also admitted by the defendant in his statement that in 1939 he could give security for Rs 25 000 He however says that as he did not want to give the bank guarantee he did not take the lease in his name He however did not inquire about the quantum of security that the estate required for executing the lease in his favour The motive given for taking the lease *benami* in the circumstances specially when the defendant did not inquire about the

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quantum of the security demanded and when he was himself in a position to give security is not at all convincing. Sri G. H. Thad was admittedly very friendly to the defendant and would have stood surety for the defendant in case the lease was negotiated for the defendant. His statement is not only improbable but is contradictory on material points. The trial court has discussed it in detail. In our opinion no reliance can be placed on his deposition.

The other evidence relied upon by the defendant in support of the *benami* transaction is that of Sita Ram D.W. 3 Shyam Lal D.W. 4 Gur Dayal D.W. 6 Deonath Sahai D.W. 7 and Mr. Phillips examined on commission. Sitaram was the manager of Messrs. Allied Electric and Radio Corporation and his evidence principally relates to the fact that the rent was paid to Ram Chandra and that repairs to his shop were done by Ram Chandra. We have already stated that the relations between the father of the plaintiff and Ram Chandra were very very cordial and Ram Chandra was looking after the affairs of Sri Thad including the construction of Mayfair Cinema. Sitaram however has stated that he had the impression that the building belonged to Sri G. H. Thad. He also says that he had no talk with the late Sri Thad as to how Ram Chandra was connected with this building. His evidence therefore does not go to prove the *benami* nature of the transaction. Shyam Lal was a Munshi of Messrs. Jethanand & Sons of which the defendant was the proprietor. His evidence is also in respect of the possession exercised by the defendant over the leased property and the constructions made by the defendant. His deposition to the effect that "Ram Chandra told me that he had taken the building on lease and whatever material was saved should be sent for construction there", is a mere hearsay especially when he further on says I do not know whe

ther any lease was executed or settled but there was no talk of lease Gur Dayal is the son of Rameshwari Dayal He was 36 years of age on the date of his deposition i e on 31st July 1956 His statement to the effect that he used to see the legal work of his father and arrange his files in his office for gaining experience and that with his father he used to go to the place of the plaintiffs and the defendants is not at all convincing According to his statement there was a talk between his father and G H Thad sometime in 1940 in which G H Thad had told his father that he was negotiating for a long term lease and would like the lease to be transferred in the name of Ram Chandra His father died in 1952 and ten or eleven years before he is said to have heard the talk He had not at that time passed his High School Examination He became a teacher only in the lifetime of his father He is unable to give any other important talk between his father and his father's client His statement is a tissue of lies and has rightly been rejected

Deonath Sahai D W 7 only says G H Thad had taken the lease from Rasoolpur estate of the shop occupied by the Allied Electric and Radio Corporation and occupied by Sen and Sanyal and Akhtar Hair Dresser G H Thad did not tell me as to for whose benefit he had taken this lease But later on in my presence he expressed his desire to make transfer of the lease in favour of Ram Chandra and he had stated this thing to his counsel late Rameshwari Dayal His statement to the effect that Sri Thad had expressed his desire to make the transfer of the lease in favour of Ram Chandra is contradicted by defendant Ram Chandra himself when he expressly states that no fourth person was present when the talk took place He admitted that he had left the service of the plaintiff in May 1950 and when in 1952 he approached the

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plaintiffs for providing some accommodation the plaintiffs refused to provide him with any accommodation

Mr Phillips who was examined on commission has stated The talks regarding the deed of transfer used to take place between Sri Thad and Rameshwari Dayal in my presence Mr Thad used to say that there should be a deed of transfer Mr Thad told Mr Rameshwari Dayal to draft it This statement is obviously incorrect and is contradicted by the defendant himself as mentioned earlier Mr Phillips further on says I was told by Mr Thad that the deed was taken by him *benami* because if it was taken in Ram Chandra's name the terms would not have been so liberal He got it done easily and without any security being deposited by him as he had already taken the cinema building If Mr Ram Chandra had taken it in his name the terms would have been hard It has not been suggested by the defendant as to what were the terms which according to him were hard and how the same were liberalised when the lease was taken in the name of Mr Thad As mentioned earlier the only case of the defendant has been that because of security being demanded from the defendant in case the lease was taken in his name the lease was taken in the name of G H Thad His statement does not inspire confidence

The documentary evidence relied on by the defendant is also not very helpful especially when it is admitted that the relation between the parties were very cordial and that the defendant was in actual possession of the property leased under the lease of 1939

Another circumstance that has to be borne in mind is that this was a lease for 10 years only According to the statement of the defendant himself it was not disclosed to the Raja that he was the real lessee It has been argued by Sri *Nasiruddin* learned counsel for the respondent that in view of the fact that the real

nature of the lease was not disclosed to the Raja and inasmuch as the relationship between the lessor and the lessee in the case of lease are of reciprocal rights and liabilities there could be no *benami* lease in law We find some force in this argument but as we are not satisfied from evidence on the record that the lease of 1939 was *benami* for the defendant we express no opinion on this proposition of law

That the lease of 1939 was not *benami* is also borne out from the fact that all that the defendant has said is that the lease was obtained for the benefit of the defendant Merely because a person leased property out of love and affection and permits another person to enjoy its benefits the character of the lease would not become that of a *benami* lease

Ex 32 is the written statement of the defendant filed on his behalf before the Rent Control and Eviction Officer in s 3 proceedings Para 15 of the said written statement reads as under—

> (15) That partly in view of the great cordiality and intimacy of the relations existing between the petitioner s father Mr G H Thad and the opposite party and partly in consideration of the great obligations of the petitioner s father to the opposite party for the great sacrifices made and services rendered by the latter the petitioner s father who was already a lessee of the Rasulpur Estate in respect of the Mayfair premises adjacent to the premises in question undertook to obtain a lease of the premises in question from the Estate for opposite party and himself carried on negotiations with the Estate for a lease of the premises for and on behalf of the opposite party He eventually succeeded in obtaining the said lease from the Estate in December 1939

The above assertion also suggests that the lease was obtained for the benefit of the defendant out of love and affection and regard for the defendant

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The breach of trust in the circumstances seem to be more by the defendant than by the plaintiffs Para 17 of the written statement reads thus

> (1) That owing to the extreme cordiality of relations existing between the petitioner's father and opposite party, the agents of the Estate also did not make any distinctions between them and a lease in respect of the premises in dispute was eventually granted by the Estate in the name of the petitioner's father

If this allegation represents the true picture then the statement of the defendant about the motive for obtaining the lease *benami* in the name of the plaintiffs father falls through and the defendant is contradicted by his own written statement

Next, it is submitted by Sri *Jagdish Swarup* that the defendant spent an amount of Rs 53 000 in additional constructions besides the amount spent in repairs and renovation of building The amount spent in the first place has been disputed The defendant admittedly was a big contractor He has not produced his account books to prove the amounts spent by him He has admitted that no sanction was obtained from the Municipal Board for making additional constructions He has also admitted that no plans were submitted to the Municipal Board According to the plaintiffs the defendant was enjoying the full benefits of 1939 lease and all that he spent was out of the rent realised from the tenants occupying the premises of 1939 lease The oral evidence without corroboration from the account books which was the best evidence, in the circumstances is not reliable Our attention was also drawn to the fact that the plaintiff had admitted in his deposition that the defendant has spent about Rs 50 thousand to Rs 60 thousand The plaintiffs have explained by saying that

the sum of Rs 50 000 to Rs 60 000 was typed out incorrectly in place of 15 000 to 16 000 and that the plaintiffs had brought this fact to the notice of the court immediately when the mistake was noticed by them The oral evidence produced on behalf of the defendant in proof of the amount spent in construction is also not based on any documentary evidence and is mere guess work

Coming now to the second point as to whether the lease of 1947 in favour of the plaintiffs was *benami* for the defendant we find that there was absolutely no evidence to the effect that the lease of 1947 was *benami* for the defendant The defendant himself in his written statement (para 32) stated that in spite of execution of the lease of 1939 negotiations continued between the agents of Rasulpur estate on the one hand and the defendant and the plaintiffs father on the other for the long term lease of the entire building (including the premises covered by the lease of 1939) and it was eventually agreed that such a lease would be granted In pursuance of the said agreement the plaintiffs subsequently obtained another lease from the Rasulpur estate after the death of their father Under the circumstances referred to above the second lease having been executed only in continuation of the first one dated the 22nd December 1939 should be deemed to be of the same *benami* character as the earlier one The underlined sentence would disclose that the defendant challenges the real character of the lease because the same was in continuation of the first lease of 1939 Ex 10 is the lease in favour of the plaintiffs A sum of Rs 36 000 was paid by the plaintiffs in respect of the said lease as will be clear from the details of payment given therein Defendant in his letter (Ex 52) written to the plaintiff has stated of course I do not know what happened to you afterwards when the lease for the remaining portion

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was taken out by you and that too secretly In his statement also when he was confronted with Ex 52 he stated I mean in this para that the lease was finally taken by the plaintiffs secretly Therefore so far as the lease of 1947 was concerned neither the defendant paid any money for the said lease nor was the lease taken *benami* for the defendant It was as a matter of fact taken secretly i e a fraud was committed on him when the lease was taken in favour of the plaintiffs No fraud has been pleaded in this case and therefore we need not go into that question The lease of 1947 was a 90 year lease of the remaining adjoining property in the name of the plaintiffs and the plaintiffs had admittedly remained in possession of that portion of the property It cannot therefore be said that the lease of 1947 was *benami* for the defendant

The next point urged by the learned counsel for the appellant is based on the proposition that if the trustee gets a renewal of the lease which is subject of the trust or acquires a property using his advantage in the matter of acquisition of the property his position as trustee of the lease or property so acquired is impressed with the trust Sri *Jagdish Swarup* has contended that the lease of 1939 being *benami* for the defendant the plaintiffs father was a mere trustee and the lease of 1947 being a lease in the nature of a renewal of the property which was subject to a trust the new lease is impressed with the trust He has in support of his submissions relied on the following

Keech v *Sandford* (1) Lewin on Trusts 13th Edn p 178 *Dyer* v *Dyer* (2) Law of Trusts by Keeton 3rd Edn, p 168 Chesire on Modern Real Property 5th Edn, p 539 *Corpus Juris Secundum* 89 C J S pp 943-44, and Agnew on Trusts p 111

(1) 25 E R. 223. (2) 30 E R 42

In *Corpus Juris Secundum* it is stated that a result ing trust is created where the legal estate is disposed of or acquired but the intent appears or is inferred or assumed from the terms of the disposition or from the accompanying facts and circumstances that the beneficial interest is not to go with the legal title

Dyer v. *Dyer* (1) is a case of advancement The facts of the case were that copyhold was granted to *A* and *B*, his wife and *C* his only son to take in succession for their lives and the life of the survivors The purchase money was all paid by *A* It was held that *C* is not a trustee of his life interest for *A* but takes it beneficially as an advancement from his father The question in this case was as to what was the nature of succession of *C* and in that context it was held that *C* was not a trustee but he took it beneficially as an advancement from his father

Keech v. *Sandford* (2) was a lease devised to the trustee for the benefit of the infant and the lessor before the expiration of the lessee refused to renew to the infant The trustee took it himself It was then held that the lessee was obliged to the infant to give an account of its profits The lease in this case was admittedly devised to the trustee for the benefit of the infant and the second lease was a renewal of the original lease and in that context it was held that the second lease ensured for the benefit of the infant

In the present case the second lease of 1947 is not a renewal of the first lease The lease of 1939 was of a very small portion for 10 years and was for residential purposes The lease of 1947 was a lease taken for building purposes Had the second lease been in renewal of the original lease and for residential purposes in respect of the same property then something could be

(1) 30 E R 42 (2) 25 E R 223

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said in support of the submissions made by Mr *Jagdish Swarup* This case is also distinguishable from the facts of the present case

Agnew on *Trusts* relied upon by the learned counsel also refers to the case of *Keech* v *Sandford* (1) which we have analysed above The principle of renewal of lease enunciated therein is not applicable to the facts of the present case and therefore does not in any way help the appellant Lewin *on Trusts* 13th Edn p 178 referred to by learned counsel reads as under—

> Section 2 Resulting Trusts upon Purchases in the name of a stranger

When real or personal property is purchased in the name of a stranger a resulting trust will be presumed in favour of the person who is proved to have paid the purchased money in the character of purchaser

'The clear result said Lord Chief BARON EYRE, of all the cases without a single exception is that the trust of a legal estate whether freehold copyhold, or leasehold whether taken in the names of the purchasers and others jointly or in the name of others without that of the purchaser whether in one name or several whether jointly or successive results to the man who advances the purchase money and it goes on a strict analogy to the rule of the common law that where a feoffment is made without consideration, the use results to the feoffor

This proposition also has no resemblance to the present case No consideration was admittedly paid in the present case The defendant did not incur any expenses in execution of the lease of 1939 Merely because the defendant was permitted to enjoy the fruits of the lease standing in the name of the plaintiffs it cannot be said that there was a resulting trust for the benefit of the defendant The cases referred to above are all cases

(1) 25 E R 223

where the consideration of the property was advanced by a person and the deed was taken in the name of other person not that the deed was taken in the name of a person who had permitted the enjoyment of the property to the other person

Learned counsel also relied on page 940 of *Corpus Juris Secundum*, Vol 89 C J deals with the nature and types of resulting trusts He relies on the passage reading as under—

> '98 *Nature and types*—Resulting trusts are created by operation of law and are creatures of equity A resulting trust is a passive or dry trust Resulting trusts are created by operation of law
>
> 68 Implied trusts arise by implication of law because morality justice conscience and fair dealing demand that the relationship be established

They are creatures of equity and are based on the equitable doctrine concerning consideration the doctrine that valuable consideration and not legal title determines the equitable title or interest Unlike constructive trusts discussed *infra* 139 *et seq*, resulting trusts are not remedial in character A resulting trust is always a passive or dry trust

> 73 *No actual trust*—In resulting trusts the relation of trustee and *cestui que trust* does not actually exist since the element of trust and confidence is absent but the holder of the legal title is declared to be a trustee on equitable principles *Teachey* v *Gurley* (1)

A mere holding of the title for the benefit of another no duties or responsibilities being imposed on the trustee as to the management control or disposition of the property except perhaps to convey to the *cestui que* trust at his direction

(1) 199 S E 83 214 N C 288

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Resulting trusts it has been said are of two general types Those where a purchase has been made and the legal estate is conveyed or transferred to one person but the purchase price is paid by another person and those where there is a gift by deed or will to a donee or grantee without pecuniary consideration coming from the grantee but the intention appears from the instrument itself that the legal and beneficial estates are to be separated and that the grantee or donee is either to enjoy no beneficial interest or only part of it

The present case is not covered by any of the propositions laid hereinbefore Neither is the present case a case of a sale nor such where a beneficial deed is created by a gift or deed or will expressly creating two interests

Reference has also been made by learned counsel to Cheshire on *Real Property* 5th Edition page 539 where in it is mentioned that

> (7) *Resulting trusts*—A resulting trust may arise in two ways—
>
> *Conveyance in the name of another*—The first is where upon a purchase of land *A* provides the money but the legal estate is conveyed to *B* a stranger in blood In this case there is a resulting trust which arises by operation of law in favour of *A* unless there are some circumstances connected with the transaction which show that *A* intended to make a gift to *B*
>
> The clear result of all the cases without a single exception is that the trust of a legal estate, whether freehold copyhold or leasehold whether taken in the names of the purchaser and others jointly or in the names of others without that of the purchaser, whether in one name or several, whether jointly or

successive results to the man who advances the purchase money

We thus find that none of these cases referred to apply in principle to the facts of the present case and even if the plaintiffs father was a trustee the said lease expired in 1939 and a fresh lease by the plaintiffs in 1947 in respect of a big property which covered the property of 1939 lease also could not ensure for the benefit of the defendant for the reasons given above

The next point urged by the learned counsel for the appellant is that if the position of the defendant was that of a licensee he having constructed a building of a permanent character the licence became irrevocable especially when the title to the property passed to the plaintiffs under the lease of 1947

In the first place we have already disbelieved the defendants evidence on the nature and quantum of constructions In the second place we have already found that the constructions were made out of the profits of the leased property which were permitted to be enjoyed by the defendant during all these years The lease of 1947 was not a renewal of the lease of 1939 and was a distinct lease and as such all that the defendant got under the lease of 1939 was the rights of a lessee and the nature of rights enjoyed by the defendant after the execution of 1947 lease could not be more than that of a sub tenant of the plaintiffs vide *Daulatram v Haveli Shah* (1) and *Ramautar Singh v Shankar Singh* (2)

We are therefore of the opinion that the suit of the plaintiffs was rightly decreed by the court below and we dismiss the appeal with costs throughout

Appeal dismissed

(1) A I R 1939 Lahore 48 (2) I L R 30 All 369

APPELLATE CRIMINAL

*Before Mr Justice G D Sahgal and Mr Justice K C Puri**

1967
August 2nd

RATI PAL AND OTHERS (APPELLANTS)
v
STATE (RESPONDENT)

Indian Penal Code, 1860 *ss* 300 *and* 34—*Injury by* pharsa—*Sufficient in the ordinary course of nature to cause death*—*Case covered by cl* 3 *of s* 300—*Common intention*—*Liability of other accused under s* 302/34 *I P C*

It is immaterial whether accused had an intention to cause the death of the deceased or not for the injury by *pharsa*, which he caused happening to be sufficient in the ordinary course of nature to cause death his case is covered by cl 3 of s 300 I P C and he must be held guilty of the offence punishable under s 302 I P C

If the person who used the *pharsa*, himself did not intend to cause the death but still he has been held guilty of the offence under s 300 I P C punishable under s 302 I P C, the other two who shared a common intention with him to cause that injury and which was in fact caused in furtherance of that intention also have to be held guilty of that offence punishable under s 302 I P C with the aid of s 34 I P C

Criminal Appeal Nos 302 of 1967 and 351 of 1967 with Capital Sentence Reference No 23 of 1967 against the judgment of A P Srivastava Additional Sessions Judge, Rae Bareli dated 23rd May 1967 in Sessions Trial No 4 of 1967

The facts appear in the judgment

J N Misra, Counsel for the Appellants

K N Kapoor, Counsel for the State

The following judgment of the court was delivered by—

SAHGAL, J —Ratipal, aged 35 years, son of Dattu, resident of Pure Chauhan, hamlet of village Mawai Alampur, police station Nasirabad in the district of Rae Bareli has been convicted by the Additional Sessions

*While sitting at Lucknow

Judge of Rae Bareli of an offence under section 302 I P C for committing the murder of one Ram Dhani by striking him on the head with a *pharsa* on the 26th of October 1966 at about 2 p m in Pure Chauhan itself in front of the house of the deceased and sentenced to death Along with him were also tried Ram Lal who is his brother and one Satti for sharing common intention with him in killing Ram Dhani though they were armed with *lathis* They also gave blows with their *lathis* on the deceased They have been convicted of the offence under s 302 with the aid of s 34 I P C and have been sentenced to life imprisonment

Ratipal submitted an appeal from jail and a reference also was submitted by the learned Sessions Judge for the confirmation of the death sentence passed against him Ratipal submitted a represented appeal also along with the other two co accused While the appeal from jail has been registered as Criminal Appeal No 302 of 1967 the represented appeal has been registered as Criminal Appeal No 351 of 1967 The two appeals and the reference have all been heard together

We have heard the learned counsel appearing on behalf of the appellants and the learned Assistant Government Advocate on behalf of the State

The prosecution case is that on the 25th of October, 1966 i e a day prior to the alleged murder, the wives of Ratipal and Satti were caught by Ram Dhani red handed plucking pods of *urd* in his field Ram Dhani took them to the door of the village Pradhan but he was not available there They were then dismissed by Ram Dhani after being given a slap each It appears that this fact came to be known by their husbands Ratipal and Satti Ram Lal appellant being a brother of Ratipal On the 26th of October 1966, after mid day, say at about 2 p m , Ram Dhani and his uncle Ram Hirkan (P W 2) were thrashing *urd* in front of their door

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The three appellants are said to have come there Ram Pal armed with a *pharsa* and the other two with *lathis* and they assaulted Ram Dhani This occurrence is alleged to have been seen among others by Ganga Ram (P W 7) Raghunath (P W 8) and Rameshwar (P W 11) Ganga Ram was irrigating his field from a well not far from the house of Ram Dhani at a distance of about 30 to 40 paces The door of the house of Ram Dhani is said to have been visible from that well It is said that it was from there that he saw the assault Raghunath (P W 8) was during those days, also irrigating his field by means of a *pur* His field is not in the vicinity but at about mid day he had come back home to take his meals and was on his way back to the field taking along with him food for his son and wife who were left at the field On his arrival in front of the *chaupal* of Ahoies he is claimed to have seen the occurrence Rameshwar (P W 11) is a neighbour of Ram Dhani He was thrashing his paddy at his door and he claims to have seen the occurrence from that place Ram Dhani was taken to the police station Nasirabad which is at a distance of about 2½ miles from the place of occurrence where Ram Hukam P W 2, his uncle lodged the first information report regarding the offence at 4 20 p m Ram Dhani was arranged to be sent to the dispensary at Jais for medical examination but as no doctor was available there he was rendered first aid by the compounder and was directed to proceed to the District Hospital at Rae Bareli He was brought to the District Hospital where his injuries were examined by Dr P K Srivastava at 7 30 p m that very day He prepared the injury report (Ex Ka 1) Dr P K Srivastava was examined before the Committing Magistrate, his statement being tendered before the Sessions Judge, it being Ex Ka 15 The following three injuries were found on the person of Ram Dhani

(1) Incised wound 7″ × 1″ × bone deep over the right side of head It was bleeding

(2) Lacerated wound ½″ × ¼″ × muscle deep over the back and inner aspect of left forearm with a swelling This injury was kept under observation

(3) Abrasion 3″ × 1½″ over the back scapular region

Injury no 3 was simple and as to injury no 2 it was found later that there was a fracture of the ulna below it Ram Dhani was in a semi conctious condition He ultimately died at the District Hospital on the 31st of October 1966 at 7 a m Information about his death was sent to the Kotwali at Rae Bareli Sub Inspector Mitthan Lal (P W 1) held the inquest on his body There was then post mortem examination The external ante mortem injuries as found by Dr D R Saluja whose statement recorded before the Committing Magistrate and tendered before the Sessions Judge is Ex Ka 16 were the same as those described above and found by Dr Srivastava Internally was found fracture of the right parietal bone 6½ long up to the right parieto occipital suture The bone was clean cut Under this fracture there was 4″ cut in the membrances Extra dural clotted blood was present on the posterior part of the fracture Brain substance had come out in the posterior part of the injury Dr Saluja was of opinion that the cause of death was the head injury which was sufficient in the ordinary course of nature to cause death

At the police station Nasirabad no Sub Inspector was present with the result that the papers were sent to the outpost at Jais which was in charge of Sub Inspector Ram Ratan Singh (P W 10) He too was not present at the outpost He returned there at about 9 45 p m but strange though it may appear he did not proceed to the spot during the night He arrived there in the next

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morning and made some interrogations the persons interrogated including Ram Hitkari (P W 2) Ganga Ram (P W 7) Raghunath (P W 8) and Rameshwar (P W 11) He inspected the spot prepared a site plan found blood on the ground near the north western corner of the house of Ram Dhani and collected stained and unstained earth from that place in two separate tins He searched for the accused but they could not be found At their house nothing incriminating was recovered Information was received at police station Nasirabad on the 3rd of November 1966 about the death of Ram Dhani when the case was converted from one under s 307 I P C under which section it was originally registered to one under s 302 I P C The appellants surrendered in the court of the Additional District Magistrate (Judl) Rae Bareli on the 7th of November 1966 Blood stained and unstained earth was sent to the Chemical Examiner who ultimately forwarded it to the Serologist and the stained earth was found to be stained with human blood The appellants were challaned on the 15th of November 1966

They all pleaded not guilty to the charges Ratipal claimed that he had been falsely implicated on account of enmity with the Pradhan and some other village people He denied that he had assaulted Ram Dhani in the manner alleged by the prosecution The case that he set up was that his wife was in her field of *urd* He heard her cries and rushed to the spot from the bed of the *rivulet* where he was scraping grass He saw that Ram Dhani deceased was holding the hand of his wife and he was dragging her in his field He gave him a *lathi* blow on the head and this *lathi* had a *phansa* like thing attached to it Ram Lal could not assign any reason of his false implication The case of Satti was that he was on inimical terms with Kurmis of village Katch ka Purwa in connection with dispute regarding

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fields and they got his name recorded in the first information report

The first information report it may be mentioned mentions the names of all the three appellants and it mentions about the incident which is said to have taken place on the 25th of October 1966 also that Ram Dhani had caught the two ladies and had brought them to the door of the Pradhan having found them plucking pods of *urd* in his *tarai* field the Pradhan being not present at the house No mention is however made of their being dismissed after being slapped

Fourteen witnesses were examined on behalf of the prosecution Out of them Ram Hitkari Ganga Ram Raghunath and Rameshwar (P Ws 2 7 8 and 11) are the eye witnesses Mitthan Lal (P W 1) is the Sub Inspector who held the inquest Blood stained earth was recovered in the presence of Parmeshwar Din (P W 3) The information report was scribed by Constable Clerk Rama Shanker (P W 4) The Investigating Officer Sub Inspector Ram Ratan Singh is P W 10 The other witnesses are of a formal nature No evidence was produced either oral or documentary in defence by any of the appellants

That Ram Dhani received injuries on his body including the one on his head which proved to be fatal cannot be denied and has in fact not been denied It cannot also be denied that he died as a result of injury no 1 on his head Thus there is no doubt that Ram Dhani was murdered The question is whether he was murdered by the appellants in the manner in which he is said to have been murdered

Of the eye witnesses the learned Sessions Judge rejected the testimony of Raghunath (P W 8) Raghunath has stated that he was irrigating his field by means of a *pur* along with his wife and son and at about mid day he went to his house to take his meals and to bring the food of his wife and his son and it was in these cir

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cumstances that when he happened to pass by that side, he saw the occurrence In his cross examination he has stated that at about 12 noon he had gone to his house and he stayed there for about 10 minutes and when he was coming back he saw the occurrence Thus according to this statement the occurrence would fall at about quarter past twelve or half past twelve in the day which is contrary to the prosecution case which brings it at about 2 p m The learned Sessions Judge was also impressed by the fact that normally his wife should have gone to the house to fetch food for her husband and the son On these grounds he thought that the statement of this witness could not be relied upon We are not impressed by the reasons which impelled the learned Sessions Judge to reject his testimony for all villagers do not keep watches with them and if the witness had stated that at about 12 noon he went to his house it cannot be said that it was necessarily 12 o clock by the clock and thus there was discrepancy of time We must also remember that the food had already been prepared at home and it was kept there and it was only to be brought to the *pur* and if the wife did not go to the house and he came to fetch it it cannot be said that the circumstance is such that his testimony should be disbelieved We see therefore no reason why Raghunath s testimony should have been rejected

We are however inclined to reject the testimony of Rameshwar (P W 11) He was thrashing paddy at his door According to him his house lies in the west of Ram Dhani s house and there is a *garhi* in between Ram Dhani s house and his house After the *garhi* there stands the house of Sukh Nandan and thereafter his house He says that he had to advance about 20 steps from his door in order to witness the *marpit* The assault could not have taken much time, because one blow was given by each of the appellants to the deceased when they arrived at the place of assault and if he had

to advance 20 steps from his door he could not possibly see the actual assault taking place as by that time the assault must have been over We would therefore not place reliance on the statement of Rameshwar (P W 11)

As to the other witnesses certain alleged infirmities may be pointed out in order to appreciate their evidence Kam Hitkari (P W 2) states that he raised an alarm when his nephew fell down and that the witnesses came up after he had raised the alarm This however, would not detract from the value of the testimony of the witnesses as the witnesses claim to have seen the assault from the very places where they were It may be that on the raising of the alarm they arrived on the spot He states that the assailants did not beat the deceased after he had fallen down But Ganga Ram (P W 7) states that even after he had fallen down these persons beat Ram Dhani Raghunath (P W 8) has somewhat different story to tell He states that Ram Dhani was sitting while he was thrashing *urd* He stood up while he was beaten Ganga Ram states that he was sitting when he was beaten These are but minor discrepancies and are in our opinion guarantee of the truthfulness of the evidence produced in the case as against concocted uniformity in the evidence which is always suspicious The learned counsel for the appellants pointed out that the conduct of Ram Hitkari (P W 2) was most unnatural inasmuch as even after his nephew was beaten he did not go inside the house to pick up anything in order to resist the assailants We must however remember that he is 60 years of age and the assault finished only after three blows

It was also pointed out that the defence set up by Ratipal appears to be probable because Ram Dhani was a bachelor and a young man aged 30 years only, as would appear from the post mortem report and there was every likelihood of his having misbehaved with the wife

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of Ratipal In the teeth of the evidence of the eye witnesses as we have pointed out above which there is no reason to disbelieve it is very difficult to hold that what the accused Ratipal says may be true simply from the circumstance that Ram Dhani was a bachelor and a young man We are not therefore impressed by this argument

As to the incident a day earlier, we have the statements of Ram Hitkari (P W 2) and Raghunath (P W 8) who happened to be present at the door of the Pradhan when the ladies were brought there and were slapped because the Pradhan was not available there They no doubt, do not speak anything about the ladies having been seen by them plucking pods of *urd* from the field of the deceased but the deceased did complain before them about that behaviour of theirs and they must have seen the pods also with them for Raghunath (P W 8) has stated that the women had *chhimis* (Pods) in their *kouchhas* The occurrence of a day earlier also stands established If the first information report does not mention about the slaps being given to the ladies, it being a matter of detail it cannot be concluded that the part of the story is wrong

The conclusion, therefore, is that a day earlier the wives of Ratipal and Satti had entered the *urd* field of Ram Dhani and had plucked some pods from there They were caught red handed and were brought to the house of the Pradhan where on account of the Pradhan being not available no complaint could actually be made to him but they were dismissed after being given slaps The next day Ratipal, Satti and Ram Lal, brother of Ratipal, came together at the door of Ram Dhani, where he was working and there they assaulted him with the result that he received the injuries described above one of which proved to be fatal, the injury that proved to be fatal being caused by Ratipal, by means of a *pharsa* which he had with him, while the

other two injuries were caused by *lathis* which Ram Lal and Satti had with them In these circumstances the learned Sessions Judge has held Ratipal to be guilty of the offence under s 302, I P C simpliciter and sentenced him to death while the other two have been held guilty of the offence under s 302 with the aid of s 34 I P C and have been sentenced to life imprisonment We have, in the circumstances to see as to what offence has been made out against which of the accused and what sentence should be passed against them

Ram Dhani and Ram Hitkari as we have found were working together in front of their house The three persons namely Ratipal Ram Lal and Satti came together to that place Of them while Ratipal was armed with a *pharsa*, Ram Lal and Satti were armed with *lathis* Only a day earlier Ram Dhani had given slaps to the wives of Ratipal and Satti for their stealing the *urd* pods from his field which fact naturally must not have been liked by their husbands Ram Lal is a brother of Ratipal After they arrived, they gave blows to Ram Dhani, one each with their *lathis* and the one who had a *pharsa* with the *pharsa*

The learned counsel for the appellants drew our attention to a portion of the statement of Rameshwar (P W 11) at page 30 when he states that *lathi* blows were given first to Ram Dhani Ram Lal had first beaten and thereafter Satti had beaten the victim After it Ratipal struck the *pharsa* blow Thus if this statement of Rameshwar (P W 11) is relied upon, we must come to the conclusion that first *lathi* blows were given to the deceased by Ram Lal and Satti These two blows were not given on vital parts One of the blows was given on the back at the scapular region and the other on the left forearm which resulted in the fracture of the ulna These two injuries were not such from which, according to the learned counsel and we agree

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with him it could be inferred that they were given with an intention to cause death It is thereafter that Ratipal gives the *pharsa* blow and strikes with it on the head and causes an injury which ultimately results in the death of the victim After these three injuries are given no further injury is inflicted even though Ram Dhani does not die and on the arrival of the witnesses the assailants run away From these circumstances it is urged we should infer that there was no common intention on the part of the appellants to cause the death of the deceased and they just wanted to teach him a lesson No doubt Ratipal had a *pharsa* with him and he struck Ram Dhani with the *pharsa* on the head but even after he had struck with the *pharsa* no further action was taken by them in continuing to beat the deceased even though he had not died which also shows that probably that *pharsa* injury that was caused also was not intended by any of them and it seems to have come to them by way of surprise and they must have been stunned and did not pursue the beating to the deceased any further Though we have stated above that the statement of Rameshwar (P W 11) cannot be said to be reliable even then let us assume for the sake of argument that the injuries were given in the order in which they are indicated in his statement to have been given on the body of victim We have taking his statement to be correct still to examine whether it is a case in which Ratipal should be held guilty of the offence under s 302 I P C and the other two companions of his of that offence with the assistance of s 34 I P C

So far as Ratipal is concerned his case seems to have been concluded by an authority of the Supreme Court namely *Virsa Singh* v *State of Punjab* (1) The injury that was caused by the *pharsa* used by Ratipal was in the opinion of the doctor, sufficient in the ordinary course of nature to cause death Ratipal did cause that injury with the *pharsa* that he had with him He did

(1) A I R 1958 S C 465

intend to cause that injury It is immaterial whether Ratipal had an intention to cause the death of the deceased or not, for the injury which he caused happening to be sufficient in the ordinary course of nature to cause death his case is covered by clause 3rdly of s 300 I P C and he must be held guilty of the offence punishable under s 302 I P C This is the position which cannot be escaped so far as Ratipal is concerned in view of the law laid down by the Supreme Court in *Virsa Singh s* case (1)

The question now arises as to whether the other two companions of Ratipal namely Ram Lal and Satti also could be held vicariously liable for the offence under s 302 read with s 34 I P C The three appellants came together, two armed with *lathis* and one with a *pharsa* If a man comes armed with a *pharsa* in the company of two others who are armed with *lathis* and all the three cause injuries to their victim it cannot be said that the only legitimate inference is that the person who came with the *pharsa*, came with that dangerous weapon only by way of show or to use it only in case there was any resistance and not otherwise As it is the *pharsa* was actually used as a result of which the injury was caused The person who used the *pharsa* may not have had the intention to cause the death of the victim and also the other two who accompanied him They may just have thought that they might teach Ram Dhani a lesson but an injury was caused by the *pharsa* in furtherance of their common intention and this causing of injury was not such as may not have been anticipated even by the persons who did not have *pharsa* with them Even the person who caused the injury with the *pharsa*, as we have said above may not have intended to cause death of the victim but he has to be held guilty of the offence under s 302 I P C on account of the causing of injury by virtue of the

(1) A I R 1958 Supreme Court 465

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fact that that injury resulted in the death of the victim and it was sufficient in the ordinary course of nature to cause death If the person who used the *pharsa*, himself did not intend to cause the death, but still he has been held guilty of the offence under s 300 I P C punishable under s 302 I P C the other two who shared a common intention with him to cause that injury and which was in fact caused in furtherance of that intention also have to be held guilty of that offence punishable under s 302 I P C with the aid of s 34, I P C

The result is that the conviction must be held to have been correctly recorded and the appellants have been rightly convicted Ratipal of the offence under s 302 I P C simpliciter and the other two of that offence with the aid of s 34, I P C Ratipal has been sentenced to death We see no reason why that sentence should not be confirmed It was the case of an attack with a *pharsa* on the head and Ratipal must have known that he was causing an injury which might result in death It was a case of a cold blooded attack on an unarmed person His sentence therefore, cannot be reduced So far as Ram Lal and Satti are concerned they have already been awarded the lesser penalty under the law

The appeals are accordingly dismissed and the conviction of Ratipal under s 302 I P C simpliciter and of Ram Lal and Satti under that provision of law with the aid of s 34 I P C is upheld and the sentence of death passed against Ratipal and of life imprisonment passed against the other two maintained The reference submitted by the learned Sessions Judge is accepted The appellants are in jail The sentences passed against them shall be carried out in accordance with law

Appeal dismissed

APPELLATE CRIMINAL

Before Mr Justice Khare and Mr Justice Yashoda Nandan

VISHWA MITRA SHARMA (APPELLANT)

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October 8

v

SURESH CHAND AND OTHERS (RESPONDENTS)

Code of Criminal Procedure (*Act V of*) 1898 *s* 59(1)—*Power of a private person to arrest one who in his view commits a non bailable and cognizable offence—Whether limited in point of time to the commission of the offence*

The power of a private person under s 59 of the Code of Criminal Procedure to arrest another who in the view of that person commits a non bailable and cognizable offence is confined to the time when or immediately after which such offence is committed and/or thereafter in the course of a pursuit undertaken immediately after the commission of the offence It does not extend to any time afterwards even though no such pursuit had been undertaken or if undertaken had been given up

Amarendra Nath Chakrabarty v *State of Bihar* (1) and *In re Kolavennu Venkayya* (2) relied on

Criminal Appeal No 783 of 1964 from the judgment and order of Sripat Charan Judicial Magistrate, Bijnor in Criminal Case No 398 of 1963 decided on 20th November, 1963

A B Saran, for the Appellant

V K Khana, for the Respondent

The following judgment of the court was delivered by—

KHARE, J —This is a criminal appeal from an order of acquittal and is pending before a learned single Judge of this Court He has referred the following

(1) A I R 1956 Pat 106 (2) A I R 1936 A P 166

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three questions for decision by a Division Bench of this Court

(1) Is the power of a private person under s 59 of the Code of Criminal Procedure to arrest another who in the view of that person commits a non bailable and cognizable offence confined to the time when or immediately after the said offence is committed and/or thereafter in the course of a pursuit undertaken immediately after commission of the offence, or extends to any time afterwards even though no such pursuit had been undertaken or if undertaken had been given up?

(2) In case the answer to the aforesaid question is that the power extends to any time afterwards even though no pursuit for arrest had been undertaken or if undertaken had been given up is the exercise of such power limited by any considerations, or is unqualified?

(3) If the exercise of such power is limited by any considerations what is the nature of these considerations?

The facts of the case leading to this appeal might be briefly stated as follows

On 3rd May 1963 Suresh Chandra (respondent) had lodged a report at police station Hazratganj Lucknow, against the appellant Vishwa Mitra Sharma under s 452/323, I P C Six days later, i e, on 9th May 1963 Suresh Chandra (respondent) accompanied by certain other persons met Vishwa Mitra Sharma (appellant) just outside Haldaur Railway Station in the district of Bijnor Suresh Chandra, with the help of certain other persons, arrested Vishwa Mitra Sharma and first he took him to his house and from there to police station Amhera and handed him over to the police

after lodging a report and making it clear in his report why he, as a private citizen had himself made that arrest Vishwa Mitra Sharma initiated a counter action against Suresh Chandra and others under ss 147/323/342 I P C challenging their right to arrest him and keep him in their custody The question which has therefore arisen for consideration in the present appeal is whether Suresh Chandra as a private citizen could exercise his powers under s 59 Cr P C six days after the cognizable offence of which he was an eye witness, had been committed

S 59 of the Criminal Procedure Code reads as follows

(1) Any private person may arrest any person who in his view commits a non bailable and cognizable offence or any proclaimed offender and without unnecessary delay shall make over any person so arrested to a police officer or in the absence of a police officer take such person or cause him to be taken in custody to the nearest police station

(2) If there is reason to believe that such person comes under the provisions of s 54, a police officer shall re arrest him

(3) If there is reason to believe that he has committed a non cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of s 57 If there is no sufficient reason to believe that he has committed any offence he shall be at once released '

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It is clear from a perusal of this section that its provisions enable a private person to arrest another who—

(*a*) in his view commits a non bailable and cognizable offence, or

(*b*) is a proclaimed offender (s 87, Cr P C)

The main question for consideration is what is the import of the word commits occurring in sub-s (1) of s 59 Cr P C whether it necessarily implies that the power to arrest the offender granted to a private person under s 59 Cr P C must be exercised at the time when or immediately after such offence has been committed or whether there is no time limit and such power continues to subsist and could be exercised by the private person at any time thereafter according to his choice or convenience

We have heard the learned counsel for the parties at some length It was submitted by Sri *P C Chaturvedi* learned counsel for the respondents, that a mere reading of s 59 Cr P C will show that no time limit has been fixed for the exercise of such power by a private person and therefore, the power in him to arrest the offender and take him to the nearest police station must continue till the offender has been arrested by some person or authority in connection with that offence It has further been argued that although the word used in s 59 is commits that word must be deemed to mean has committed for the simple reason that in a vast majority of the cases it is only after the contemplated offence has been committed that a private person can arrest the offender

On the other hand the argument by the learned counsel for the appellant is that the use of the word commits' in s 59 clearly indicates that such power of a private person must be exercised either while the

offence was being committed or at the most immediately thereafter in the course of pursuit necessary for effecting the arrest It has also been contended that in case such extraordinary power granted to a private person is not restricted in point of time very serious consequences might follow because on the one hand the private person in whose view the non bailable and cognizable offence is committed could claim that he could effect the arrest and use necessary force to achieve that object and on the other the accused person who was being arrested might think that he was being wrongfully subjected to arrest and resist his arrest and even claim protection under s 96 of the Indian Penal Code It is therefore argued that the Legislature intended to restrict the scope of s 59 Cr P C and to confine it to the point of time when the offence was being committed (or immediately thereafter till pursuit was made for effecting the arrest) and that it is for that reason that the Legislature has used the word commits in s 59 Cr P C The learned counsel has relied upon the following two cases in support of his argument

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(i) *In re Kolavennu Venkayya* (1)

(ii) *Amarendra Nath Chakrabarty* v *State of Bihar* (2)

The use of the word commits in s 59 Cr P C will show that the intention of the Legislature was clearly to restrict this power in a private person to the point of time when the offence was being committed or has just been committed If the intention of the Legislature had been not to restrict the powers to arrest by a private person in point of time it should have used the words had committed in place of or in addition to the word commits occurring in that section

(1) A I R 1936 A P 156 (2) A I R 1955 Pat 184

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At Common Law in England the power of a private person to arrest is limited to cases where treason or felony has been actually committed or attempted or where there is immediate danger of treason or felony being committed or where a breach of the peace has been actually committed or is reasonably apprehended Any one may without a warrant arrest a person whom he sees on the point of committing or attempting to commit treason or felony, but there is no power of arrest if the attempt has ceased—*vide* paras 633 634, *Halsbury's* Laws of England, Simond's Edition pp 342 343

The same appears to be the scheme under the Code of Criminal Procedure The power to arrest has been given to the following persons under the various provisions of that Code

(1) To a police officer under a warrant under ss 77 and 79 Cr P C and without a warrant under s 54 He may also arrest under written orders of an officer in charge of a police station under ss 56 and 107, Cr P C or under the orders of a Magistrate under ss 64 and 65, Cr P C and in non cognizable offences under s 57 Cr P C

(2) To a superior police officer under s 151 Cr P C

(3) To an officer in charge of a police station under ss 55 and 157, Cr P C

(4) To a Magistrate under ss 64 and 65, Cr P C

(5) To a military officer under ss 130 and 131, Cr P C

(6) To a private person without warrant under section 59 and under a warrant under ss 77 and 78, under orders of a police officer under s 42 and

under orders of a Magistrate under ss 42 64 and 65 Cr P C

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The scheme of the Code of Criminal Procedure, therefore appears to be that a private person may arrest any person committing in his view a cognizable and non bailable offence but if he does not care to do so just at that time (or after chase if necessary), he can subsequently effect the arrest of that person only if he has been declared to be an absconder under s 87, Cr P C or if the private person has been granted a warrant under ss 77 and 78 Cr P C or is acting under the orders of a police officer under s 42 Cr P C or of a Magistrate under ss 42 64 and 65 Cr P C An eye witness of the occurrence if he does not act immediately to effect the arrest of the accused person committing a cognizable and non bailable offence in his view cannot do so later unless the accused person has been declared to be an absconder or orders have been given to him by a police officer or a Magistrate The positive provisions contained in the Code of Criminal Procedure and referred to above by implication restrict the power of a private person to arrest an offender The private person must act within the ambit of the power conferred on him under the provisions of the Code and by no means beyond it

There is no force in the contention that the persons present at the time of the commission of the offence must remain inactive till the accused has done all acts to complete the contemplated offence The attempt to commit a non bailable and cognizable offence is also an offence as defined in s 40 I P C A person noticing that felony was attempted to be committed or was being committed or that a murder was being attempted could do much service to the society by arresting the offender and thus preventing further harm being done The

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offender in such cases would know why he was being arrested and therefore it may not even be necessary to tell him why he was being arrested By making the arrest immediately after the occurrence or when one offence had been committed and another and more serious offence was likely to be committed a private person in whose view the offence had been committed or was about to be committed could stop further harm by effecting the arrest of the offender However if such power in a private person is allowed to subsist for days and weeks after the offence has been committed serious consequences might follow For example—

(1) It might suit a private person to arrest the Mayor of Bombay just before he is going to attend an important meeting of the Corporation He might have lodged a report of some cognizable offence against the Mayor in any distant place in Bengal which the Mayor might have visited a few days earlier and then choose to arrest the Mayor in Bombay just at the time when it suited him

Subsequently the Mayor might be acquitted of the charge in respect of that cognizable offence on the ground that the prosecution had failed to establish the charge against him but he will not be in a position to successfully proceed against the private person who arrested him unless he can further prove that the charge against him was without any reasonable or probable cause and malicious

(2) An offender, not being a proclaimed offender may not even know that he is accused of having committed any cognizable offence or the person who seeks to arrest him, was an eye witness of the occurrence Not being definite as to why he was being arrested by the private person he could very well resist that arrest resulting in serious injuries

either to himself or to the private person and others who might go to arrest him

Such power if deemed to be unrestricted in point of time may very well be abused by a person because it will be in his sweet discretion as to when where and in what circumstances he may arrest the offender The liberty of the private individual guaranteed by the Constitution of India will not be safe if such extraordinary power is given to private persons to be exercised by them later according to their convenience or choice

Chap V of the Code of Criminal Procedure deals with the subject of arrest escape and retaking S 46 lays down that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action and if such person forcibly resists the endeavour to arrest him or attempts to evade the arrest such police officer or other person may use all means necessary to effect the arrest It has also been provided in the same section that a person effecting arrest will have no right to cause the death of the person sought to be arrested if he is not accused of an offence punishable with death or imprisonment for life It is therefore clear that the person lawfully trying to effect arrest while using all means necessary to effect the same may even cause the death of any person who is accused of an offence punishable with death or imprisonment for life

S 97, I P C provides that every person has a right (subject to the restrictions contained in s 99) to defend his own body and the body of any other person against any offence affecting human body The right of private defence of the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the

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offence may not have been committed and it continues as long as such apprehension of danger to the body continues (*vide* s 102 I P C) A person exercising the right of private defence may even cause the death of the offender under certain conditions (*vide* s 100, I P C)

In our opinion s 59(1) Cr P C should be so interpreted as not to unnecessarily jeopardize the liberty of the individual

There is some divergence of opinion between the various High Courts on the question of the interpretation of the words in his view occurring in s 59(1) of the Criminal Procedure Code The Calcutta *vide Bolai De* v *Emperor* (1), Lahore *vide Alawal* v *Emperor* (2) Patna *vide Abdul Aziz* v *Emperor* (3) and Sind *vide Faqiro* v *Emperor* (4) High Courts while interpreting those words held that a person who was not an eye witness of the occurrence, could in no circumstance make the arrest of the offender under s 59(1) Cr P C It was considered to be immaterial that the private person was a Daffedar and had reached the place of occurrence while the trees cut and stolen were being removed (*Bolai De* v *Emperor* (1) or had reached there immediately after the occurrence on hearing an alarm being raised by an eye witness *Alawal* v *Emperor* (2), and *Abdul Aziz* v *Emperor* (3) It was held in *Faqiro* v *Emperor* (4) that a private person exercising his power under s 59(1) of the Code of Criminal Procedure could not ask a person, who was not an eye witness, to effect the arrest of the offender

Our High Court has differed from the view expressed in all the four cases mentioned in the preceding paragraph It was held in the case of *Sheo Balak Dusadh* v *Emperor* (5), that s 59(1), Cr P C had to be read

(1) I L R 53 Cal 961 (2) A I R 1930 Lahore 78
(3) A I R 1936 Pat 808 (4) A I R 1947 Sind. 107 109
(5) A I R 1946 All. 169.

keeping in view the provisions of s 46 Cr P C It is mentioned in the latter section that all means necessary to effect the arrest could be used It was held that these words clearly implied the power to—

(*a*) chase the offender and

(*b*) to get the offender arrested by others

The same view was reiterated in the Full Bench case of *Nazir* v *Rex* (1) and it was held that those persons who had during the course of chase come to help in effecting the arrest either after being expressly asked or on hearing the general alarm raised by eye witnesses were also entitled to chase the offender and to effect his arrest

In a later case the Calcutta High Court *vide Gouri Prasad De* v *Chartered Bank of India Australia and China* (2) has taken the view that a private person being an eye witness of a cognizable offence could authorise others to help him in effecting the arrest Andhra Pradesh High Court *vide In re Kolavennu Venkayya* (3) and in a later decision the Patna High Court also *vide Amarendra Nath Chakrabarty* v *State of Bihar* (4) have taken a view similar to that taken by this Court in the Full Bench case of *Nazir* v *Rex* (5)

The view taken by this Court in the Full Bench case of *Nazir* v *Rex* (5) (and now accepted by some other High Courts also) does not help us to interpret the meaning of the word commits occurring in s 59(1), Cr P C However, there are two cases one of Patna High Court and the other of Andhra Pradesh High

(1) A I R 1951 All 8
(2) A I R 1956 A P 136
(3) A I R 1956 Cal 954
(4) A I R 1955 Pat 104
(5) A I R 1951 All 8

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Court directly on that point In the case of *Amarendra Nath Chakraborty* v *State of Bihar* (1) the person accused of having committed the offence of rape on a minor girl was arrested by the eye witnesses immediately after the occurrence He was taken to his brothers who chastised him Thereafter the accused was allowed to go away Some one lodged a report of the occurrence at the police station Just a few hours thereafter some eye witnesses of the occurrence again arrested the accused person It was held that in the circumstances of the case the second arrest was not authorised by the provisions of s 59(1) Cr P C and was illegal It was further observed that the provisions of s 59(1) of the Code of Criminal Procedure are extraordinary in nature and must be construed in a manner so as not to enlarge the powers of a private individual to arrest a person

In the case of *In re Kolavennu Venkayya* (2), while considering the import of the word commits occurring in s 59(1) Cr P C it was observed that in no circumstance that word could be held to be equivalent to the words had committed The arrest made by an eye witness fifteen days after the occurrence was held to be illegal and not authorised under the provisions of s 59(1) Cr P C

We respectfully agree with the view taken in the two cases mentioned above

In the result our reply to the questions referred to the Division Bench are as follows—

(1) The power of a private person under s 59, Cr P C to arrest another, who in the view of that person commits a non bailable and cognizable offence, is confined to the time when, or immediately after, such offence is committed and/or there-

(1) A I R 1966 Pat 106 (2) A.I.R 1966 A Pradesh 156

after in the course of a pursuit undertaken immediately after the commission of the offence It does not extend to any time afterwards even though no such pursuit had been undertaken or if undertaken had been given up

(2) and (3) In view of the reply to question No (1) these questions do not arise

Questions answered

CRIMINAL REVISION

Before Mr Justice Mahesh Chandra and Mr Justice Gangeshwar Prasad

1966 November 30

GURU PRASAD PANDEY (APPLICANT)

v

STATE AND OTHERS (OPPOSITE PARTIES)

Code of Criminal Procedure, (*Act V of* 1898) *as amended by Act XXVI of* 1955) *ss* 145 146 *and* 435 *to* 439—*Proceedings under s* 145—*Reference to Civil Court under s* 146—*Magistrate disposing of proceeding in accordance with the findings of the Civil Court—Magistrate's order—If revisable by the Sessions Judge or the High Court—Respective scope of—ss* 435 *to* 439

The words the records of which has been called for by itself or which has been reported for orders occurring in s 439 of the Code refer to the provisions in ss 435 to 438 of the Code and will therefore refer to any proceeding which is not of such a court A proceeding before the civil court arising on a reference under s 146 cannot be said to be a proceeding of a Criminal Court so as to attract the Code Consequently an order under sub-s (1 B) of s 146 of the Code by the Magistrate disposing of the proceeding under s. 145 of the Code would not be amenable to the revisional jurisdiction under s 439 of the Code if it is in conformity with the finding of the Civil Court

In the matter of the petition of Bhup Kunwar (1) followed

Criminal Revision No 1270 of 1963 connected with Criminal Revisions Nos 1387 2106, 2107 and 2108 of 1965 against the judgment and order of B Narain Sessions Judge, Ghazipur, in Criminal Revision No 6 of 1963 decided on 27th July 1963

S K Verma, for the Applicant

R K Srivastava and *K P Srivastava,* for the Opposite Parties

(1) ( ) I L R XXVI All 249 (F B)

The following judgment of the court was delivered by—

M CHANDRA, J —The question referred to this Bench for decision by TRIPATHI, J is—

> Whether an order passed by a Magistrate under sub s (1 B) of s 146 of the Code of Criminal Pro cedure disposing of the proceeding under s 145 in confirmity with the decision of the civil court is amenable to the revisional powers of the Sessions Judge and the High Court.

For an answer of the question it will be useful first to examine the relevant provisions of the Criminal Procedure Code Sub s (1) of s 145 Cr P C provides for the procedure to be followed by the Magistrate when a dispute concerning any land or water or the boundaries thereof is likely to cause breach of peace

Sub s (1) of s 145 Cr P C runs thus—

> Whenever a District Magistrate Sub Divisional Magistrate or Magistrate of the first class is satis fied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute and further requiring them to put in such docu ments or to adduce, by putting in affidavits the evidence of such persons as they rely upon in sup port of such claims

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Sub-s (2) of s 145, Cr P C defines the expression land or water Sub-s (3) provides for the manner of service of the order under sub-s (1) Sub-s (4) then provides for a speedy enquiry by the Magistrate as to possession without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute

The old s 146 Cr P C provided that where the Magistrate decided that none of the parties was in possession at the relevant time or was unable to satisfy himself as to which of them was then in such possession of the subject of dispute he might attach it until a competent Court had determined the rights of the parties thereto or the person entitled to the possession thereof Sub-s (1) of s 146, Cr P C was, however amended by Act XXVI of 1955 and now runs as follows

> '146 (1) If the Magistrate is of opinion that none of the parties was then in such possession or is unable to decide as to which of them was then in such possession of the subject of dispute, he may attach it and draw up a statement of the facts of the case and forward the record of the proceeding to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in sub-s (4) of s 145 and he shall direct the parties to appear before the Civil Court on a date to be fixed by him
>
> Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time, if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute

(1 A) On receipt of any such reference, the Civil Court shall peruse the evidence on record and take such further evidence as may be produced by the parties respectively consider the effect of all such evidence and after hearing the parties decide the question of possession so referred to it

(1 B) The Civil Court shall as far as may be practicable within a period of three months from the date of the appearance of the parties before it conclude the inquiry and transmit its finding together with the record of the proceeding to the Magistrate by whom the reference was made and the Magistrate shall on receipt thereof proceed to dispose of the proceeding under s 145 in conformity with the decision of the Civil Court

(1 C) The costs if any consequent on a reference for the decision of the Civil Court shall be costs in the proceedings under this section

(1 D) No appeal shall lie from any finding of the Civil Court given on a reference under this section nor shall any review or revision of any such finding be allowed

(1 E) An order under this section shall be subject to any subsequent decision of a Court of competent jurisdiction

(2) When the Magistrate attaches the subject of dispute he may if he thinks fit and if no receiver of the property the subject of dispute has been appointed by any Civil Court appoint a receiver thereof who subject to the control of the Magistrate shall have all the powers of a receiver appointed under the Code of Civil Procedure

Provided that in the event of a receiver of the property, the subject of dispute being subsequently

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appointed by any Civil Court possession shall be made over to him by the receiver appointed by the Magistrate who shall thereupon be discharged

It is thus evident that when a Magistrate is unable to decide as to which of the parties in dispute was in possession or finds that none of the parties was in possession he may even now attach the property But he does not stop there and let the parties themselves go to the Civil Court Now he himself refers the matter to the Civil Court for decision of the question The Civil Court will consider the evidence on record and may also take further evidence as may be produced by the parties and then after hearing them decide the question of possession Against this finding of the Civil Court there can be no appeal review or revision under sub s (1 D) of s 146 Cr P C

On receipt of the decision the Magistrate has to proceed to dispose of the proceedings under s 145 Cr P C in conformity with the decision of the Civil Court The question then arises whether the order of the Magistrate in conformity with the decision of the Civil Court is revisable The contention of the learned counsel for the applicant is that such an order is revisable under s 439 Cr P C because it has merged in the order of the Magistrate

S 439(1), Cr P C runs as follows

> 'In the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge the High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by ss 423, 426 427 and 428 or on a Court by section 338 and may enhance the sentence and when the Judges composing the

Court or Revision are equally divided in opinion the case shall be disposed of in manner provided by s 429

1 Cases Referred Section

The important words which need consideration in this section are any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge The contention of the learned counsel for the applicant is that the words any proceeding in this case are very wide and would also include consideration of the finding of the Civil Court when they have merged in the finding of the Magistrate in view of the fact that the order of the Magistrate is in conformity with the finding of the Civil Court M Chandi J

Before we consider that question it is necessary also to consider the provisions of ss 435 to 438 of the Criminal Procedure Code S 435 Cr P C provides for the power to call for the records of inferior Courts and runs as follows

435 (1) The High Court or any Sessions Judge or District Magistrate or any Sub Divisional Magistrate empowered by the State Government in this behalf may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court and may when calling for such record, direct that the execution of any sentence or order be suspended and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record

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Explanation—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of s. 437.

(2) If any Sub-Divisional Magistrate acting under sub-s. (1) considers that any such finding, sentence or order is illegal or improper or that any such proceedings are irregular, he shall forward the record with such remarks thereon as he thinks fit to the District Magistrate.

(3) * * * *

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

This section not only gives the power to call for the records but also to examine the record of a proceeding. The proceeding must be of an inferior Criminal Court and not of any Court. This is obvious because the purpose of examining the record of the proceeding is to satisfy itself or himself as to the correctness, legality or propriety of the finding, sentence or order recorded or passed and also as to the regularity of the proceedings of that inferior Court. Thus s. 435, Cr. P. C. specifically mentions the restriction that the proceedings of which the record is called for and examined is to be of an inferior Criminal Court.

s. 436, Cr. P. C. gives the power to the High Court or the Sessions Judge to order after examination of the record further enquiry into any complaint which has been dismissed under s. 203 or sub-s. (3) of s. 204 or into the case of any person accused of an offence who has been discharged.

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S 437 Cr P C gives the power to the Sessions Judge or the District Magistrate to order commitment for trial This power has also to be exercised after an examination of the record of the proceedings of the inferior Criminal Court Such Judge or Magistrate has also the power to direct the inferior court to enquire into the offence if he finds from the evidence how that some other offence has been committed to the record It runs as follows

> 437 When on examining the record of any case under s 435 or otherwise the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court the Sessions Judge or District Magistrate may cause him to be arrested and may thereupon instead of directing a fresh inquiry order him to be committed for trial upon the matter of which he has been in the opinion of the Sessions Judge or District Magistrate improperly discharged
>
> Provided as follows
>
> (*a*) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made
>
> (*b*) that if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused such Judge or Magistrate may direct the inferior Court to inquire into such offence

S 438 Cr P C gives the power to the Sessions Judge or the District Magistrate after examination of the record of the proceeding to report for the orders of the

High Court the result of the examination and also to recommend that a sentence or an order be reversed or altered This power is also given to an additional Sessions Judge S 438 Cr P C runs as follows

438 (1) The Sessions Judge or District Magistrate may if he thinks fit on examining under s 435 or otherwise the record of any proceeding report for the orders of the High Court the result of such examination and when such report contains a recommendation that a sentence or an order be reversed or altered may order that the execution of such sentence or order be suspended and if the accused is in confinement that he be released on bail or on his own bond

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge

In all these ss 436 to 438 Cr P C there is a specific reference to s 435 Cr P C This and the nature of the provisions themselves clearly show that the powers under these sections can be exercised only in respect of a proceeding before any inferior Criminal Court

The words or otherwise used in ss 436 to 438 Cr P C do not mean in any other way whatsoever but in any other way provided by the Code For instance a Court hearing an appeal may have to exercise the power under this section Or a Sessions Judge in the course of a sessions trial may find it necessary to direct under s 437, Cr P C the commitment of persons discharged under s 209 Cr P C by the committing Magistrate These words are therefore to be restricted to powers found under the Code They do

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M. Chandra J.

not confer a power by themselves but only save a power which already exists It is not unusual to find such general saving words in statutes Such words cannot therefore refer to powers which do not already exist under the Code When they follow the particular words under s 435 they must be construed according to the general rule and cannot have reference to any power outside the Code or in any other way whatsoever but only mean in any other way provided by the Code and would therefore relate to the proceedings of an inferior Criminal Court only and not of a Court which is not inferior and is not a Criminal Court

The word proceeding used in s 438 Cr P C must also be a proceeding referred to in s 435 Cr P C that is a proceeding before an inferior Criminal Court For instance it cannot refer to a proceeding in which the District Magistrate or an officer is acting in an executive capacity Nor can it refer to a proceeding before a civil court

It will then be evident that the words the record of which has been called for by itself or which has been reported for orders occurring in s 439 Cr P C refer to the provisions contained in ss 435 to 438 Cr P C and will therefore relate to the proceeding of an inferior Criminal Court

The contention of the learned counsel for the applicant is that the words or which otherwise comes to its knowledge relate to proceedings not only of an inferior Criminal Court but to proceedings of other courts This contention is without force The phrase or which otherwise comes to its knowledge follows the earlier phrases record of which has been called for by itself and which has been reported for orders and relates to the earlier words any proceeding The

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Vs Chandra J

words any proceeding must, therefore have the same meaning in all the three eventualities Obviously in view of the previous ss 435 to 438 Cr P C the phrase the record of which has been called for and the phrase which has been reported for orders cannot refer to any proceeding which is not a proceeding of an inferior Criminal Court for ss 435 to 438 Cr P C refer as already pointed out only to the proceeding of such a Court

In a Full Bench decision of this Court reported *in the matter of the petition of Bhup Kunwar* (1) the Full Bench in the words of STANLEY, C J held

> The general words with which the section opens namely in the case of any proceeding, must, I think be understood as used in reference to the subject matter in the mind of the Legislature, which was undoubtedly the records and orders of inferior Criminal Courts referred in the earlier section, s 435, and must be strictly limited to it They cannot have general application For example the Court could not exercise powers of revision in respect of proceedings of Courts outside the local limits of its jurisdiction The words any proceeding are undoubtedly qualified words and a meaning must be given to them which best suits the scope and object of the Statute That meaning is to be found in s 435 I have no hesitation in holding that these words any proceeding before any inferior Criminal Court situate within the local limits of the Court s jurisdiction

A contrary view has been taken by the Full Benches of the Lahore and Bombay High Courts in *Dhanpat Rai* v *Balak Ram* (2) and *Emperor* v *Bhatu Sadu* (3) We,

(1) (FB) I L R XXXI All 249 (2) A I R 1949 Lah 761
(3) A I R 1952 Bom 225

however for the reasons already mentioned find ourselves in agreement with the view taken by STANLEY C J and BEAMAN J and would follow the Full Bench decision of this Court

BANTA GIRI PRASAD PANDEY v. M. Chandra, J.

It has been contended by the learned counsel for the applicant that this view had been doubted as early as 1926 in *Banwari Lal v. Jhumla* (1) by SULAIMAN J but SULAIMAN J as he then was actually said:—

> It may be that the word proceeding in s 439 may mean the proceeding in any Criminal Court referred to in s 4 (k) or it may possibly mean any proceeding to which the Code of Criminal Procedure is applicable

SULAIMAN J did not there express his inclination to accept either of the meanings He merely referred to the two meanings possible of the word proceeding in s 439 Cr P C and then observed that the Full Bench had accepted the view that the word proceeding meant—

> Proceeding in any Criminal Court and not necessarily any proceeding referred to in the Code of Criminal Procedure

It cannot, therefore be said that the meaning attributed to the word proceeding by the Full Bench of this Court was doubted in *Banwari Lal v. Jhumla* (1) Indeed SULAIMAN J said that he was bound to follow that view and saw nothing in the amended Code which could alter the effect of that Full Bench decision

There is no doubt that so far as the proceeding before the Magistrate is concerned it would be amenable to revision if an error has been committed by the Magistrate in not passing an order in conformity with the

(1) A I R 1926 All 229

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finding of a Civil Court. But when he had passed an order in conformity with the finding of the Civil Court he had committed no error. To make such an order liable to interference in revision would be in effect to provide for a revision of the finding and the proceeding before the Civil Court which is not a Criminal Court at all much less an inferior Criminal Court. It was contended by the learned counsel for the applicant that the proceedings before the Civil Court also retain the character of a criminal proceeding inasmuch as it is a proceeding under the Criminal Procedure Code. It is obvious that the proceedings before a Civil Court do not retain the character of a proceeding of a Criminal Court. This is also clear from the fact that s. 146(1 D) does not bar only an appeal or a revision but also review of a finding. There is no question of a review in a criminal proceeding. The very fact that a provision barring for a review is made in s. 146 itself shows that the proceeding before the Civil Court does not retain the character of a criminal proceeding.

In *Ram Chandra Agarwal* v *State* (1) MUDHOLKAR, J. speaking for the Court referred to the following words of JAGDISH SAHAI J. in *Sri Sheonath Prasad* v *City Magistrate Varanasi* (2)—

> a proceeding even on reference made to a Civil Court retains its old moorings and does not change its character from a criminal proceeding to a civil proceeding and does not become a proceeding in the suit

MUDHOLKAR J. observed with reference to this decision of this Court—

> This decision ignores the vast body of authority which is to the effect that when a legal right is in

(1) 1966 A.W.R. (S.C.) 674. (2) 1959 A.W.R. 595.

dispute and the ordinary courts of the country are seized of such dispute the courts are governed by the ordinary rules of procedure applicable to them

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GURU PRASAD PANDEY v STATE

Mr Chandra J

The contention of Mr *Goyal*, the learned counsel for the applicant in the case before the Supreme Court was that since the proceeding before the Criminal Court under s 145 is a criminal proceeding any matter arising out of it including a reference to a Civil Court does not lose its initial character of a criminal proceeding In respect of this contention MUDHOLKAR J observed

> No doubt the Magistrate while discharging his function under the Code of Criminal Procedure under s 146 would be exercising his criminal jurisdiction because that is the only kind of jurisdiction which the Code confers upon the Magistrates but when the Magistrate refers the question to a Civil Court he does not confer a part of his criminal jurisdiction upon the Civil Court There is no provision under which he can clothe a court or a tribunal which is not specified in the Criminal Procedure Code with criminal jurisdiction We are, therefore unable to accept the contention of Mr *Goyal*

It is thus clear that even though the proceedings before the Civil Court arise out of a reference made in a criminal proceeding they do not retain the character of a criminal proceeding and cannot by any stretch of imagination be said to be proceedings of a Criminal Court It was definitely held by the Supreme Court that it was a proceeding before the Civil Court S 439 Cr P C would not therefore apply to those proceedings

Law

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M. Chandra, J.

The learned counsel for the applicant relied on a decision of the Patna High Court reported in *Raja Singh v. Mahendra Singh* (1) and also on *Rengammal v. Rama Subbaravalu Reddiar* (2), *Inder Singh v. State* (3), *Dhanbat Rai v. Balak Ram* (4) and *Emperor v. Bhalu Sadu* (5).

In *Raja Singh v. Mahendra Singh* (1) the Full Bench of the Patna High Court held that the High Court would interfere with the finding of a Civil Court under s. 145 and 439 of the Code of Criminal Procedure after the finding is adopted by the Magistrate and the final order is passed. With respect we find ourselves unable to agree with that view. S. 435 Cr. P. C. is expressly restricted to a proceeding before an inferior Criminal Court. The decision proceeded on the basis that the finding of the Civil Court had been adopted by the Magistrate and had thus become a part of its finding or in other words a finding of a Criminal Court. This is obviously against the provisions of s. 146 Cr. P. C. Sub-s. (1-D) of s. 146 Cr. P. C. specifically provides that the Magistrate shall on receipt of the finding proceed to dispose of the proceeding under s. 145 Cr. P. C. in conformity with the decision of the Civil Court. The very use of the phrase in conformity with shows that the proceeding before the Civil Court is a separate proceeding and the decision of the proceeding before the Magistrate is to be in conformity with the decision of the Civil Court. It is not similar to the proceedings before a Civil Court after reference of certain issues to the Revenue Court where a certain issue is referred for finding by a Revenue Court. The Civil Court there does not merely pass an order in conformity with the decision of the Revenue Court but

(1) A.I.R. 1973 Pat. 240
(2) A.I.R. 1960 Mad. 109
(3) A.I.R. 1984 Raj. 81
(4) A.I.R. 1981 Leh. 761
(5) A.I.R. 1938 Bom. 925

decides certain issues itself wherever necessary and then incorporates the finding of the Revenue Court in its own decision and gives a decision thereafter in accordance with the findings of the Revenue Court on certain issues and its own findings on other issues Even then it may be said that the proceeding before the Revenue Court is not the same as the proceeding before the Civil Court and it had been specifically provided in s 332 B of the U P Zamindari Abolition and Land Reforms Act (now repealed) that for the purpose of appeal the finding of the Revenue Court will be deemed to be a part of a finding of the Civil Court There is no such provision in the Criminal Procedure Code and the proceedings before the Civil Court retain their character as such and do not become a part of or merge in the finding of a Magistrate or a Criminal Court and retains its individual character of the proceeding of a Civil Court That Full Bench decision was earlier than the Supreme Court decision in *Ram Chandra's* case (1) in which the nature of the proceeding on a reference to the Civil Court has been clarified by the Supreme Court

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Ali Chandra J

In *Rangammal's* case (2) RAMASWAMI, J, observed

> This restriction is but proper because the findings get merged in the decision of the Magistrate and all the grounds that can be urged against the finding can be urged against the finalised decision

This also proceeds on the basis that the findings get merged in the decision of the Magistrate For the reasons already mentioned we find ourselves unable to agree with the view of RAMASWAMI J In fact RAMASWAMI J himself relied on an earlier decision in *Muthu Sethuraya v Loodusami Odayar* (3) In that case

(1) 1966 A W R (S C) (2) A I R 1960 Mad 169
(3) A I R 1950 Mad 111

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itself it was held that the High Court had no jurisdiction to go into the correctness or legality or otherwise of the findings of the Civil Court SOMASUNDARAM, J observed that to do that would be to do a thing indirectly what is directly prohibited What at the most this Court can do in revision is to ascertain whether the Criminal Court has implemented the decision of the Civil Court To this limited extent only a revision can lie according to SRI SOMASUNDARAM J Although this decision was cited by RAMASWAMI J in *Rengammal's* case (1) the earlier decision of the Madras High Court was not dissented from by him

In *Inder Singh's* case (2) C B BHARGAVA J of Rajasthan High Court held—

> If the Legislature intended that finality should be attached to the orders passed under s 146(1 B) then a provision could have been inserted in this section that the order passed under s 146(1 B) would be final and no revision would lie against that order

He consequently thought that a revision lay against the orders passed under s 146(1 B) With respect we find ourselves unable to agree with that view Such a conclusion does not follow from the provisions of s 146(1 D) which bars an appeal a review or revision against the finding of the Civil Court Nor does it follow from the provisions of sub s (1 B) of the section When the proceeding before a Civil Court is not a criminal proceeding we have to see if such a decision of the Civil Court is amenable to revision under any provisions of the Criminal Procedure Code merely because the Magistrate has passed an order in conformity with the decision of the Civil Court In fact, the very use of the words decision of the Civil Court gives

(1) A I R 1960 Mad 189 (2) A I R 1964 Raj 61

it a character which is different from a mere finding So far as s 439 Cr P C is concerned we have already seen that it is confined to the proceeding of an inferior Criminal Court

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M Chandra, J

For the same reasons we do not agree with the decisions in *Dhanpat Rai* v *Balak Ram* (1) and *Emperor* v *Bhatu Sadu* (2)

It was also contended by the learned counsel for the applicant that if the order of the Magistrate in conformity with the decision of the Civil Court is manifestly incorrect in view of a gross legal error by the Civil Court there is no reason why the applicant should be forced to take recourse to a regular suit and this Court should exercise powers under s 439 Cr P C This contention is without substance We find that even in the earlier Code there was no provision for a revision against an order passed under s 145 Cr P C Even the ordinary recourse was had to the High Court's powers under the Letters Patent and its powers of superintendence Similar powers can now be exercised under Arts 226 and 227 of the Constitution

In a series of decisions of this Court reported in *Taashua Hussain* v *State* (3) *Choley Lal* v *Babulal* (4) and *Badri Nath Pandey* v *U P State* (5) it has been held that the revisional Court cannot go into the propriety of a finding of a Civil Court in a revision made to challenge the final order of the Magistrate based on the finding of the Civil Court These are all single Judge decisions of this Court but for the reasons already mentioned we agree with the conclusions reached in those decisions

The learned counsel for the applicant also relied on a decision of this Court reported in *Ram Samujh* v

(1) A I R 1931 Lah 761
(2) A I R 1933 Bom 32
(3) A I R 1959 All 806
(4) A I R 1960 All 32
(5) 1963 A L J 1101

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Gurc Prasad Pandey v. State

M Chandra J

State (1) BROOME, J interfered and allowed a revision against an order based on the finding of the Civil Court In that case however BROOME, J observed that since the Court acted without jurisdiction his decision was a nullity in the eye of law Since the judgment was a mere nullity it must be entirely disregarded Obvious ly, when the City Munsif of Azamgarh was divested of jurisdiction in view of the order of stay of the High Court there could be no order in conformity with the decision of a Court divested of jurisdiction This deci sion does not help the applicant

In another case reported in *Mohammad Vakil* v *Mohammad Munuddin* (2) relied upon by the learned counsel for the applicant GYANENDRA KUMAR, J ob served

> Moreover, it is only in exceptional and appro priate cases that the High Court could interfere with the findings of the Civil Court as well if they were in flagrant violation of the well recognised principles of law

The revision was, in fact dismissed and this was a stray observation made by the learned Judge in that case on a point which was not really canvassed before him In any case we find ourselves unable to agree with the view that such a power of interference is given by s 439 Criminal Procedure Code

For the reasons already mentioned our answer to the reference is that an order passed by a Magistrate under sub-s (1 B) of s 146 of the Code of Criminal Procedure disposing of the proceeding under s 145, Cr P C if it

(1) 1962 A W R 168 (2) 1963 A W R 682

is in conformity with the decision of the Civil Court, is not amenable to the revisional powers of the Sessions Judge and the High Court in so far as the decision of the Civil Court is concerned

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Let the records of this case and the connected criminal revisions be put up before the Judge concerned

Reference answered

SUPREME COURT

APPELLATE CIVIL

Before Mr Justice Wanchoo, Mr Justice Bachawat and Mr Justice Bhargawa

PANNA LAL (APPELLANT)

v

MURARI LAL (DEAD) BY HIS LEGAL REPRESENTATIVE (RESPONDENT)

1967

February 27

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Indian Limitation Act, (IX of) 1908 *Art* 164—*Application for setting aside ex parte decree where summons not duly served on defendant—Limitation for—Starting point of*

The expression knowledge of the decree whence the limitation for the application for setting aside of the *ex parte* decree by a defendant not duly served with summons must be counted means to knowledge of the particular decree which is sought to be set aside and not merely some vague information that some decree had been passed against him It is a question of fact in each case whether the information received by the defendant is sufficient to impute to him knowledge of the decree within the meaning of Art 164 of the Limitation Act

Civil Appeal No 866 of 1964 from the Judgment and Order dated the 7th April 1964 of the Allahabad High Court in F A F O No 367 of 1959

S G Patwardhan (*Rameshwar Nath and Mahinder Narain* and *Prayag Das Agarwal* with him) for the Appellant

J P Goyal and *Raghunath Singh* for the Respondents

The following judgment of the Court was delivered by—

BACHAWAT J —This appeal incidentally raises a question of interpretation of Art 164 of the Indian

Limitation Act 1908 The respondent instituted two suits against the appellant in the court of the first Civil Judge Kanpur Suit No 25 of 1958 was for the recovery of moneys due on a mortgage for Rs 50 000 Suit No 22 of 1958 was to recover a sum of Rs 8 000 due on a *ruqqa* On May 15 1958 both the suits were decreed *ex parte* The appellant filed an application to set aside the *ex parte* decree passed in Suit No 22 of 1958 This application was numbered as Miscellaneous Case No 104 of 1958 On August 16 1958 the first Civil Judge Kanpur passed an order setting aside this *ex parte* decree on certain conditions The order sheet in O S No 22 of 1958 Misc Case No 104 of 1958 on August 16 1958 stated

> Heard parties counsel accept the applicant's affidavit and hold that due to non service applicant was prevented from being present Allowed on condition of payment of Rs 150 as costs within a month and on condition that allotment shall continue
>
> (Sd) K N GOYAL
>
> *16th August* 1958

Applicant is hereby informed of connected decree of 25 of 1958 as well

(Sd) K N GOYAL

16th August 1958

An appeal by the appellant from this order was dismissed on September 25 1958 On February 3 1959 an advocate employed by the appellant to file a civil revision petition against the appellate order obtained a certified copy of the order dated August 16 1958 On February 24 1959 a civil revision petition was filed by the appellant against the appellate order On April 16

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Bachawat, J

1959 the appellant filed an application in the court of the first Civil Judge Kanpur under O 9 r 13 C P C for the setting aside of the *ex parte* decree passed in Suit No 25 of 1958 The Civil Judge dismissed the application An appeal from this order filed by the appellant was dismissed by the High Court Both the courts held that the summons in Suit No 25 of 1958 was not duly served on the appellant but as more than 30 days had expired after the appellant had knowledge of the *ex parte* decree, the application was barred by limitation under Art 164 of the Indian Limitation Act 1908 The appellant now appeals to this Court by special leave

Under O 9 r 13, C P C, a decree passed *ex parte* against a defendant is liable to be set aside if the summons was not duly served or if the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing If the summons is not duly served the defendant suffers an injury and he is entitled *ex debito justitiae* to an order setting aside the *ex parte* decree provided he applies to the court within the prescribed period of limitation Under Art 164 of the Indian Limitation Act, 1908, the period of limitation for an application by a defendant for an order to set aside a decree passed *ex parte* was 30 days from the date of the decree or when the summons was not duly served, when the applicant had knowledge of the decree The onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application If the defendant produces some evidence to show that the application is within time it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application

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BACHAWAT J

In *Pundlick Rowji* v *Vasantrao Madhavrao* (1) DAVAR, J, held that the expression 'knowledge of the decree' in Art 164 means knowledge not of a decree but of the particular decree which is sought to be set aside a certain and clear perception of the fact that the particular decree had been passed against him On the facts of that case DAVAR, J held that a notice to the defendant that a decree had been passed against him in the High Court suit No 411 of 1909 in favour of one Pundlick Rowji with whom he had no dealings was not sufficient to impute to him clear knowledge of the decree in the absence of any information that the decree had been passed in favour of Pundlick Rowji as the assignee of a promissory note which he had executed in favour of another party This case was followed by the Calcutta High Court in *Kumud Nath Roy Chowdhury* v *Jotindra Nath Chowdhury* (2) In *Bapurao Sitaram Karmarkar* v *Sadhu Bhiva Gholap* (3), the Bombay High Court held that the evidence of two persons who had been asked by the plaintiff to tell the defendant about the decree and to settle the matter was not sufficient to impose knowledge of the decree on the defendant within the meaning of Art 164 MACLEOD, C J, said

> We think the words of the article mean something more that mere knowledge that a decree had been passed in some suit in some Court against the applicant We think it means that the applicant must have knowledge not merely that a decree has been passed by some Court against him but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum A judgment debtor is not in such a favourable position as he used to be when he had thirty days from the time when execution

(1) 11 B L R 1906 (2) I L R 38 Cal 894 403
(3) I L R 47 Bom 485

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Bachawat J

was levied against him But we do not think that the Legislature meant to go to the other extreme by laying down that time began to run from the time the judgment debtor might have received some vague information that a decree had been passed against him

This decision was followed in *Batulan* v *S K Dwivedi* (1) and other cases We agree that the expression 'knowledge of the decree in Art 164 means knowledge of the particular decree which is sought to be set aside When the summons was not duly served limitation under Art 164 does not start running against the defendant because he has received some vague information that some decree has been passed against him It is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of Art 164 The test of the sufficiency is not what the information would mean to a stranger but what it meant to the defendant in the light of his previous dealings with the plaintiff and the facts and circumstances known to him If from the information conveyed to him the defendant has knowledge of the decree sought to be set aside time begins to run against him under Art 164 It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree so that he has a clear perception of the injury suffered by him and can take effective steps to set aside the decree

In this case in his application for setting aside the *ex parte* decree the appellant stated that he got the information of the passing of the *ex parte* decree in Suit No 23 of 1958 for the first time from the respondent

(1) ( ) I L R 33 Pat 1025 1060—8

on 15th April, 1959 It has been shown conclusively that this statement is false The respondent filed an affidavit stating that the appellant was directly informed of the passing of this *ex parte* decree by the first Civil Judge on 16th August 1958 This statement was not denied by the appellant The courts below concurrently found that the appellant was personally present in the court of the first Civil Judge on 16th August, 1958 when the learned judge informed him that an *ex parte* decree had been passed against him in Suit No 25 of 1958 The appellant was informed that Suits Nos 22 and 25 of 1958 were connected suits The appellant knew that he had dealings with the respondent in respect of a *ruqqa* and a mortgage He knew that the Suit No 22 of 1958 was filed on the *ruqqa* From the information conveyed to him by the Civil Judge on 16th August 1958 it must have been clear to the appellant that an *ex parte* decree had been passed against him in favour of the respondent in Suit No 25 of 1958 on the basis of the mortgage The appellant had thus on 16th August, 1958 clear knowledge of the decree passed against him in Suit No 25 of 1958 which he now seeks to set aside Time began to run against him from 16th August, 1958 under Art 164 of the Indian Limitation Act 1908 The application filed by him on 16th April 1959 was therefore, clearly barred by limitation and was rightly dismissed by the courts below

In the result, the appeal is dismissed with costs

Appeal dismissed

SUPREME COURT

APPELLATE CIVIL

1967
March 9

Before Mr Justice Wanchoo, Mr Justice Bachawat and Mr Justice Bhargava

MULRAJ — APPELLANT,

v

MURLI RAGHUNATHJI MAHARAJ — RESPONDENT

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

U P (Temporary) Control of Rent and Eviction Act (*III of*) 1947 *s* 3—*Code of Civil Procedure, (Act V of)* 1908 *s* 151 *and O* 41, *r* 5—*Permission for ejectment of tenant given after the passing but before the knowledge of stay order—Whether valid*

An order of stay in an execution matter is in the nature of a prohibitory order addressed to the execution Court and as such takes effect from the time it comes to the knowledge of that Court. It does not till then affect or deprive the Court of its jurisdiction to proceed with the execution It is, however open to the Court to take such action in the matter as may be required in the interest of justice in its inherent jurisdiction under s 151 of the Code after the stay order comes to its knowledge

What is true of execution proceedings applies with greater force where the stay order has been passed in the proceedings for transfer of the case Accordingly where the permission for ejectment of the tenant was granted under s 3 of the U P Control of Rent and Eviction Act after the passing but before the knowledge of the stay order by the District Magistrate, the permission is not a nullity and the suit based on the same is good and effective

[The position may be different and not governed by the above rule (as to which no opinion was expressed in this case) where the stay order is made for ministerial officers e g requiring a bailiff not to sell]

The decision in *Bessessuari Chowdurany* v *Horro Sunder Mozmadar* (1) and those following it affirmed

(1) (1896-97) 1 C W N 227

The decision in *Hukum Chand Bold v Kamlanand Singh* (1) and those following it overruled.

Yogeshwar Prasad and *S S Khanduja*, for the Appellant

Hardev Singh, for the Respondent

Civil Appeal No 1938 of 1966 from the Judgment and Order dated the 20th April 1966 of the Allahabad High Court in Second Appeal No 2648 of 1964

The following Judgment of the Court was delivered by —

WANCHOO J —This is an appeal by special leave against the judgment of the High Court of Allahabad Brief facts necessary for present purposes are these The respondent filed a suit against the appellant for eviction from a shop which the appellant had taken on monthly rent from the respondent The suit was filed after permission had been obtained under the U P (Temporary) Control of Rent and Eviction Act No III of 1947 (hereinafter referred to as the Act) in the court of the Munsif in Jhansi It was contested by the appellant and one of the points raised before the trial court was that as the permission to sue had been granted at a time when there was a stay order the Magistrate granting the permission had no jurisdiction to do so and therefore the permission was a nullity On that basis it was contended that the suit should fail for no suit could continue under the Act without such permission

The Munsif dismissed the suit The respondent then went in appeal The appeal court upheld the order of the Munsif taking the view that the permission granted after the stay order had been passed was a nullity The respondent then came in second appeal to the High Court and the only point considered there

(1) (1906) I L R 33 Cal 927

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was whether the permission granted by the Magistrate was a nullity or not It may be mentioned that though the stay order had been passed on 29th September 1961 by the District Magistrate, the Magistrate who was dealing with the matter of permission had no knowledge of it when he granted the permission on 4th October, 1961 The question that arose before the High Court therefore was whether the permission granted in these circumstances could be said to be a nullity The High Court held that the stay order could not and did not take away the jurisdiction of the Magistrate from the moment it was passed and that as the Magistrate had no knowledge of or information about the stay order when he granted the permission on 4th October 1961, that permission was with jurisdiction and the suit would therefore be maintainable As no other point was apparently in dispute in the High Court it allowed the appeal and granted a decree for ejectment and rent in favour of the respondent The appellant then obtained special leave from this Court, as there is some conflict of opinion between the High Courts on this question

As we have already indicated, the facts on the question raised before us are not in dispute When the application for permission was pending before Sri Nigam Magistrate I Class who had jurisdiction to deal with that application by virtue of the authority delegated to him by the District Magistrate, it appears that the appellant applied for the transfer of proceedings relating to permission from Sri Nigam's court On that transfer application, the District Magistrate passed an order staying further proceedings till the disposal of the transfer application This order was not communicated to the Magistrate concerned by the office of the Dis

trict Magistrate Nor does it appear that the appellant informed the Magistrate of the order of stay with the result that on 4th October 1961 the Magistrate gave permission to the respondent to file a suit for execution When however the respondent filed the suit in the Munsif's court, the appellant raised the question that as a stay order had been passed on 29th September, 1961, the permission granted on 4th October 1961 was a nullity as the Magistrate dealing with the matter had lost his jurisdiction thereunder

There has been difference of opinion between the High Courts on the question of the effect of a stay order, particularly with reference to execution proceedings The High Courts of Calcutta Patna and Punjab have held that in such a case the stay order takes effect from the moment it is passed and the fact that the court executing the decree has no knowledge of it makes no difference and all proceedings taken in execution after the stay order has been passed are without jurisdiction On the other hand the High Courts of Madras and Kerala have taken the view that the executing court does not lose its jurisdiction from the moment the stay order is passed and that the order being in the nature of a prohibitory order the court carrying on execution does not lose its jurisdiction to do so till the order comes to its knowledge and that proceedings taken in between are not a nullity The Allahabad High Court seems to have taken an intermediate view and has held that where rights of third parties like a stranger auction-purchaser have intervened the fact that the executing court had no knowledge would protect third parties

The earliest case on the point is *Bessessuri Chowdhurany* v *Horro Sunder Mozmadar* (1) In that case a Division Bench of the Calcutta High Court held

(1) (1896 97) 1 C W N 297

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that "an order staying execution of a decree against which an appeal is pending is in the nature of a prohibitory order, and as such would only take effect when communicated. If a property is sold before such an order is communicated to the court holding the sale, such sale is not void and cannot be treated as a nullity. In *Hukum Chand Boid* v *Kamalanand Singh* (1) another Division Bench of the same High Court dissented from the view taken in *Bessesswari Chowdhurany*'s case (2) and held that an order of stay takes effect from the moment it is passed and the knowledge of the court to which it is addressed is immaterial and from the moment the order is passed the court to which the application is made for execution has no authority to execute it. It is these two cases of the Calcutta High Court which are the basis of the decisions of other High Courts. Some High Courts, as already indicated, have accepted the view in *Bessesswari Chowdhurany*'s case (2) while other High Courts have followed the view taken in *Hukum Chand Boid*'s case (1).

Before we consider the question raised before us we may indicate the leading cases on the two sides briefly. The Patna High Court in *Lukat Mian* v *Padampat Singhania* (3) and the Punjab High Court in *Din Dyal Ram* v *Union of India* (4) follow *Hukum Chand Boid*'s case (1). The Madras High Court in *Kasaribada Venkatachalpati Rao* v *Maddipatla Kameshwaranand* (5) follows *Bessesswari Chowdhurany*'s case (2). The Kerala High Court in *Cheeramparambilalikutty* v *Thalavanaparambilalikutty* (6) also follows *Bessesswari Chowdhurany*'s case (2). It is unnecessary to refer to other cases of these court which were cited before us for they follow the view taken in these leading cases.

(1) I L R (1906) XXXIII Cal 927
(2) (1896 97) 1 C W N 297
(3) A I R 1951 Pat 130
(4) A I R 1954 Punj 46
(5) I L R (1918) XLI Mad 181
(6) I L R 169 Ker 828

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Wanchoo J

The Allahabad High Court in *L. Parsotam Saran v. B. Barkha Nand* (1) as already indicated took an intermediate view and held that where a third party's interest intervened, the stay order does not nullify a sale in favour of a third party. But where only the parties to the execution proceedings were concerned it followed the view taken in *Hukum Chand Bond's* case (2).

We are of opinion that the view taken in *Beseswari Chowdhurany's* case (3) is the correct one. An order of stay in an execution matter is in our opinion in the nature of a prohibitory order and is addressed to the court that is carrying out execution. It is not of the same nature as an order allowing an appeal and quashing execution proceedings. That kind of order takes effect immediately it is passed for such an order takes away the very jurisdiction of the court executing the decree as there is nothing left to execute thereafter. But a mere order of stay of execution does not take away the jurisdiction of the court. All that it does is to prohibit the court from proceedings with the execution further and the court unless it knows of the order cannot be expected to carry it out. Therefore till the order comes to the knowledge of the court its jurisdiction to carry on execution is not affected by a stay order which must in the very nature of things be treated to be a prohibitory order directing the executing court which continues to have jurisdiction to stay its hand till further orders. It is clear that as soon as a stay order is withdrawn the executing court is entitled to carry on execution and there is no question of fresh conferment of jurisdiction by the fact that the stay order has been withdrawn. The jurisdiction of the court is there all along. The only effect of the stay order is to prohibit the executing court from proceeding further and that can only take effect when the executing court has knowledge of the order. The

(1) A I R (1927) All 401 (2) I L R (1906) XXXIII Cal 227
(3) (1896 97) 1 C W N 227

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Wanchoo J.

executing court may have knowledge of the order on the order being communicated to it by the court passing the stay order or the executing court may be informed of the order by one party or the other with an affidavit in support of the information or in any other way. As soon therefore as the executing court has come to know of the order either by communication from the court passing the stay order or by an affidavit from one party or the other or in any other way the executing court cannot proceed further and if it does so it acts illegally. There can be no doubt that no action for contempt can be taken against an executing court if it carries on execution in ignorance of the order of stay and this shows the necessity of the knowledge of the executing court before its jurisdiction can be affected by the order. In effect therefore a stay order is more or less in the same position as an order of injunction with one difference. An order of injunction is generally issued to a party and it is forbidden from doing certain acts. It is well settled that in such a case the party must have knowledge of the injunction order before it could be penalised for disobeying it. Further it is equally well settled that the injunction order not being addressed to the court if the court proceeds in contravention of the injunction order the proceedings are not a nullity. In the case of a stay order as it is addressed to the court and prohibits it from proceeding further as soon as the court has knowledge of the order it is bound to obey it and if it does not it acts illegally and all proceedings taken after the knowledge of the order would be a nullity. That in our opinion is the only difference between an order of injunction to a party and an order of stay to a court. In both cases knowledge of the party concerned or of the court is necessary before the prohibition takes effect. Take the case where a stay order has been passed but it is never brought to the notice of the court, and

the court carries on proceedings in ignorance thereof It can hardly be said that the court has lost jurisdiction because of some order of which it has no knowledge This to our mind clearly follows from the words of O XLI r 5 of the Code of Civil Procedure which clearly lays down that mere filing of an appeal does not operate as stay of proceedings in execution but the appellate court has the power to stay the execution Obviously when the appellate court orders stay of execution the order can have effect only when it is made known to the executing court We cannot agree that an order staying execution is similar to an order allowing an appeal and quashing execution proceedings In the case where the execution proceeding is quashed the order takes effect immediately and there is nothing left to execute But where a stay order is passed execution still stands and can go on unless the court executing the decree has knowledge of the stay order It is only when the executing court has knowledge of the stay order that the court must stay its hands and anything it does thereafter would be a nullity so long as the stay order is in force

It is argued that this view would introduce uncertainty inasmuch as proceedings may go on and it may take sometime—whether long or short for the stay order to reach the court There is in our opinion no question of uncertainty even if we hold that the stay order must come to the knowledge of the court to which it is addressed before it takes effect The court may receive knowledge either on receipt of an order of stay from the court that passed it or through one party or the other supported by an affidavit or in any other way There is in our opinion no uncertainty by reason of the fact that the court to which the stay order is addressed must have knowledge of it before it takes effect for it can always be proved that the court to which the stay order was addressed had knowledge of it and that is not a matter

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Wanchoo J.

which should really create any difficulty or uncertainty Once it is clear that a stay order is in the nature of a prohibitory order knowledge of it by the court which is prohibited is essential before the court is deprived of the power to carry on the proceedings As was pointed out in *Bassesswari Chowdhurany*'s case (1) the appellate court has nothing to do with the execution of the decree, the execution proceeds under the direction of the court which made the decree and it has full authority to execute it An order of stay does not undo anything which has been done, its utmost effect is to stop further action in the direction of execution but it would only have that effect when it reached the court or person whose duty it was to obey it

As we have already indicated, an order of stay is as much a prohibitory order as an injunction order and unless the court to which it is addressed has knowledge of it it cannot deprive that court of the jurisdiction to proceed with the execution before it But there is one difference between an order of injunction and an order of stay arising out of the fact that an injunction order is usually passed against a party while a stay order is addressed to the court As the stay order is addressed to the court, as soon as the court has knowledge of it it must stay its hand if it does not do so it acts illegally Therefore in the case of a stay order as opposed to an order of injunction as soon as the court has knowledge of it it must stay its hand and further proceedings are illegal but so long as the court has no knowledge of the stay order it does not lose the jurisdiction to deal with the execution which it has under the Code of Civil Procedure

Though the court which is carrying on execution is not deprived of the jurisdiction the moment a stay order is passed even though it has no knowledge of it this

(1) (1896-97) 1 C W N 297

does not mean that when the court gets knowledge of it it is powerless to undo any possible injustice that might have been caused to the party in whose favour the stay order was passed during the period till the court has knowledge of the stay order We are of opinion that s 151 of the Code of Civil Procedure would always be available to the court executing the decree, for in such a case when the stay order is brought to its notice it can always act under s 151 and set aside steps taken between the time the stay order was passed and the time it was brought to its notice if that is necessary in the ends of justice and the party concerned asks it to do so Though, therefore, the court executing the decree cannot in our opinion be deprived of its jurisdiction to carry on execution till it has knowledge of the stay order the court has the power in our view to set aside the proceedings taken between the time when the stay order was passed and the time when it was brought to its notice if it is asked to do so and it considers that it is necessary in the interests of justice that the interim proceedings should be set aside But that can only be done by the court which has taken the interim proceedings in the interst of justice under s 151 of the Code of Civil Procedure provided the order is brought to its knowledge and a prayer is made to set aside the interim proceedings within a reasonable time Otherwise the interim proceedings in our opinion are not a nullity and in the absence of such exercise of power by the court executing the decree under s 151, they remain good for all purposes

What we have said about execution proceedings applies with greater force to stay orders passed in transfer applications as in the present case In the case of execution proceedings at any rate there is an appeal in which a stay order is passed the transfer proceedings are collateral proceedings and even though the superior

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J

authority may have the power to stay it cannot deprive the inferior authority having jurisdiction of that jurisdiction unless the inferior authority is apprised of the order by the superior authority In the present case the order of stay never came to the knowledge of the Magistrate concerned till he gave the permission on 4th October 1961 Later on the District Magistrate himself dismissed the transfer petition The order was not brought to the knowledge of the Magistrate concerned by the appellant at any time Nor did he ever apply to the Magistrate to set aside the permission passed in ignorance in the interest of justice In these circumstances the appellant cannot challenge the permission as a nullity in the suit which has been brought on the basis of that permission

We may however add that what we have said above refers only to proceedings being carried on by courts or authorities after the stay order has been passed and before they have knowledge of it But this may not apply in a case where stay is made for ministerial officers as for example in the case of a court asking a bailiff not to sell and the bailiff selling without knowledge of the order of the court prohibiting it to carry on the sale The position in such a case may be different but as to that we express no final opinion in the present appeal

The appeal therefore fails and is hereby dismissed with costs

Appeal dismissed

SUPREME COURT

APPELLATE CIVIL

Before Mr Justice Wanchoo, Mr Justice Bachawat and Mr Justice Ramaswami

MADAN LALL (DEAD) BY HIS LEGAL REPRESENTATIVE APPELLANT 1967 March 9

v

SUNDER LALL AND ANOTHER RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Arbitration Act, (10 of) 1940 s 30—*Indian Limitation Act* (9 of) 1908—*Objection against an award on grounds covered by s 30 of Arbitration Act filed beyond 30 days of the notice of filing the award—Whether capable of being treated and heard as an application for setting aside the award.*

Where an objection as in the present case against a judgment being passed in terms of the award raises grounds which fall squarely within s 30 of the Arbitration Act that objection cannot be heard by the Court or treated as an application for setting aside the award unless it is made within 30 days of the service of notice of the filing of the award as prescribed by Art 158 of the Limitation Act

Decisions in *Hastimal Dalichand Bora* v *Hira Lal Motichand Mutha* (1) and *Saha and Co* v *Isharsingh* (2) distinguished

The decision in *Mohan Das* v *Kessumal* (3) reconciled

Civil Appeal No 999 of 1964 from the Judgment and Decree dated the 15th April 1963 of the Allahabad High Court Lucknow Bench in First Appeal From Order No 30 of 1960

B C Misra, (*C P Lal* with him) for the Appellant

S P Sinha, (*P K Chatterjee* with him) for the Respondent No 2

(1) A I R 1954 Bom 248 (2) A I R 1956 Cal 821
(3) A I R 1953 Ajm 47

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SUNDAR LALL

The following Judgment of the Court was delivered by —

WANCHOO, J —This is an appeal on a certificate granted by the Allahabad High Court and arises in the following circumstances On 20th May 1965, an agreement was entered into between the appellant and the respondents referring certain differences between them to the arbitration of three persons On 19th January, 1956 an award was made signed by two out of the three arbitrators as the third arbitrator had refused to sign the award The award was filed in court on 7th September 1957 and the respondents prayed for a decree in accordance with the award Notice of filing of the award was issued to the appellant and was served upon him on 30th September 1957 On 3rd November 1957 the appellant filed an objection in the nature of a written statement By this objection the appellant attacked the validity of the award on various grounds But the objection did not contain any prayer at the end nor did it indicate what relief the appellant desired though there were as many as 43 paragraphs therein When the matter came to be heard in the trial court the respondents contended that the so called objection was in the nature of an application to set aside the award and contained grounds coming under s 30 of the Arbitration Act No 10 of 1940 (hereinafter referred to as the Act) Therefore as the objection was filed more than 30 days after the notice was served on the appellant it was barred by limitation under Art 158 of the Indian Limitation Act No 9 of 1908

The trial court held that the appellant's objection was not maintainable, as his remedy was to apply under s 33 of the Act if he wanted the award to be set aside on the grounds raised in the objection As he had not done

so and as the objection was itself filed more than 30 days after the service of notice on him he was barred from raising any ground for setting aside the award which fell under s 30 of the Act The trial court also held that the objection could not be treated as an application under s 33 of the Act in view of the fact that it was beyond 30 days as required by Art 158 of the Limitation Act The trial court therefore passed a decree in terms of the award

The appellant then went in appeal to the High Court and the main question urged there was whether the appellant could maintain his objection when he had failed to make an application under s 33 of the Act for setting aside the award on grounds contained in the objection It seems that there were other points also before the High Court but the High Court held that if the main question was answered against the appellant it would not be necessary to go into other points It seems therefore that other points were not pressed before the High Court The High Court came to the conclusion that the award could not be set aside on grounds which fell under s 30 of the Act, except on an application under s 33 of the Act within thirty days of the service of notice of filing of the award as required by Art 158 of the Limitation Act The High Court further held that the objection of the appellant could not be treated as an application under s 33 as if it was treated as such application it would be barred by time The High Court therefore dismissed the appeal but granted a certificate to the appellant to appeal to this Court

We have heard learned counsel for the appellant on the main question raised in the High Court We may add that learned counsel wanted to raise other points which were not pressed before the High Court but we have not permitted him to do so

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We are of opinion that this appeal must fail The Act was passed in 1940 and as the long title shows it is an Act to consolidate and amend the law relating to arbitration Before 1940 the law relating to arbitration was mainly contained in the Second Schedule to the Code of Civil Procedure which was repealed by the Act which is now a self contained code in the matter of arbitration The scheme of the Act is to divide arbitration into three classes The first consists of *arbitration without intervention of a Court* and is contained in Chap II of the Act which has 17 sections from s 3 to s 19 The second consists of *arbitration with intervention of a court where there is no suit pending*, which is in Chap III of the Act and there is only one section (s 20) therein as sub-s (5) thereof applies the other provisions contained in the Act to this type of arbitration also so far as they can be made applicable The third type of arbitration is contained in Chap IV namely *arbitration in suits* This chapter contains 5 sections, and s 25 thereof applies the other provisions of the Act so far as they can be made applicable

Chap II makes various provisions with respect to arbitrations of the first type Reference may be made to a few which are material for our purpose S 5 lays down that the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement S 8 gives power to court to appoint an arbitrator or umpire in certain circumstances S 11 gives power to court to remove an arbitrator or umpire in certain circumstances and s 12 gives consequential power to court to appoint persons to fill vacancies which may have arisen S 13 provides for powers of the arbitrators and s 14 provides for the award to be signed and filed When the award is filed the

court has to give notice to the parties of the filing of the award under s 14 (2) Under s 15, the court is given power to modify or correct an award and under s 16 the court can remit the award for reconsideration S 17 provides for judgment in terms of the award and reads thus

> Where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall after the time for making an application to set aside the award has expired or such application having been made after refusing it proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award

S 19 gives power to the court to supersede the arbitration agreement in certain circumstances

This analysis of the relevant provisions of the Act contained in Chap II which apply *mutatis mutandis* to arbitrations of the other two types shows that the court has to pronounce judgment in accordance with the award if it sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, or if it sees no cause to set aside the award The court has to wait for the time given to a party to make an application for setting aside the award and where such an application has been made the court has to decide it first and if it rejects it the court proceeds to pronounce judgment according to the award It is clear therefore from s 17 that an application to set aside the award is contemplated therein and it is only when no such application has been made within the time allowed or if such an application has been filed and has been rejected that the court

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proceeds to pronounce judgment in terms of the award The Act therefore contemplates the making of an application to set aside an award and the grounds on which such an application can be made are to be found in s 30 The grounds on which an application can be made for setting aside the award are—(*a*) that an arbitrator or umpire has misconducted himself or the proceedings, (*b*) that an award has been made after the issue of an order by the court superseding the arbitration or after arbitration proceedings have become invalid under s 35, or (*c*) that an award has been improperly procured or is otherwise invalid These are the only grounds on which an award can be set aside under s 30 and it will be seen that if a party wants an award to be set aside on any of these grounds it has to make an application Thus any party wishing to have an award set aside on the ground that it was improperly procured or otherwise invalid has to make an application We may also refer to s 32 which lays down that notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence effect or validity of an arbitration agreement or award nor shall any arbitration agreement or award be set aside amended, modified or in any way affected otherwise than as provided in this Act

It is clear therefore from the scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in s 30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Art 158 of the Limitation Act If no such application is made the award cannot be set aside on any of the grounds specified in s 30 of the Act It may be conceded that there is no special form prescribed for making such an application and in an appropriate case an objection of the type made in this case may be treated as such an application, if it is filed within the period

of limitation But if an objection like this has been filed after the period of limitation it cannot be treated as an application to set aside the award, for if it is so treated it will be barred by limitation

It is not in dispute in the present case that the objections raised by the appellant were covered by s 30 of the Act and though the appellant did not pray for setting aside the award in his objection that was what he really wanted the court to do after hearing his objection As in the present case the objection was filed more than 30 days after the notice it could not be treated as an application for setting the award for it would then be barred by limitation The position thus is that in the present case there was no application to set aside the award on grounds mentioned in s 30 within the period of limitation and therefore the court could not set aside the award on those grounds There can be no doubt on the scheme of the Act that any objection even in the nature of a written statement which falls under s 30 cannot be considered by the court unless such an objection is made within the period of limitation (namely 30 days) though if such an objection is made within limitation that objection may in appropriate cases be treated as an application for setting aside the award

Learned counsel for the appellant however urges that s 17 gives power to the court to set aside the award and that such power can be exercised even where an objection in the form of a written statement has been made more than 30 days after the service of the notice of the filing of the award as the court can do so *suo motu* He relies in this connection on *Hastimal Dalichand Bora* v *Hiralal Motichand Mutha* (1) and *Saha & Co* v *Ishar singh Kripalsingh* (2) Assuming that the court has power to set aside the award *suo motu* we are of opinion that that power cannot be exercised to set aside an award

(1) A I R (1954) Bom 248 (2) A I R (1956) Cal 321

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on grounds which fall under s 30 of the Act if taken in an objection petition filed more than 30 days after service of notice of filing of the award for if that were so the limitation provided under Art 158 of the Limitation Act would be completely negatived The two cases on which the appellant relies do not in our opinion support him In *Hastimal's case* (1) it was observed that if the award directs a party to do an act which is prohibited by law or if it is otherwise patently illegal or void it would be open to the court to consider this patent defect in the award *suo motu*, and when the court acts *suo motu* no question of limitation prescribed by Art 158 can arise These observations only show that the court can act *suo motu* in certain circumstances which do not fall within s 30 of the Act

Saha & Co's case (2) was a decision of five Judges by a majority of 3 2 and the majority judgment is against the appellant The minority judgment certainly takes the view that the non existence or invalidity of an arbitration agreement and an order of reference to arbitration may be raised after the period of limitation for the purpose of setting aside an award because they are not grounds for setting aside the award under s 30 It is not necessary in the present case to resolve the conflict between the majority and the minority Judges in *Saha & Co's case* (2) for even the minority judgment shows that it is only where the grounds are not those falling within s 30 that the award may be set aside on an objection made beyond the period of limitation, even though no application has been made for setting aside the award within the period of limitation Clearly therefore where an objection as in the present case raises grounds which fall squarely within s 30 of the Act that objection cannot be heard by the court and cannot be treated as an application for setting aside the award unless it is

(1) A I R (1954) Bom 249 (2) A I R (1956) Cal 591

made within the period of limitation *The Sahu & Co's case* (1) therefore, also does not help the appellant

Learned counsel for the appellant also relies on *Mohan Das v Kessumal* (2) In that case the objection which was made more than 30 days after the service of notice was that the award had been filed by a person not authorised by the arbitrator to do so The court held that such an objection did not fall within s 30 of the Act and therefore Art 158 of the Limitation Act did not apply On these facts the decision in that case may be right But the court seems to have made a general observation that Art 158 cannot apply to a written statement by a defendant in reply to an application to have the award made a rule of the court If by that general observation the court means that even if the objection is of the nature falling within s 30 and is filed more than 30 days after service of notice it would be open to the court to set aside the award on such objection we are of the opinion that the view is incorrect

In the result the appeal fails and is hereby dismissed with costs

Appeal dismissed

(1) A I R (1956) Cal 327 (2) A I R (1959) Ajm 47

CIVIL MISCELLANEOUS

Before Mr Justice Satish Chandra

B M SINGH PETITIONER

v

1967 THE UNIVERSITY OF ALLAHABAD THROUGH ITS

March 10 REGISTRAR AND OTHERS OPPOSITE PARTIES

Allahabad University Act, (*III of*) 1921 *s* 29 *St* 20, *Ord* 26 *of Sh XII—Seniority of teachers for holding an office or for membership of Authorities or Bodies of University—Determination of—Substantive appointment whether includes temporary or officiating appointment*

Substantive appointment (wherefrom the length of service rendered in each rank is to be counted) within the meaning and for the purposes of cl 205 of the Statutes of the University of Allahabad providing for the determination of seniority among teachers for holding any office or for the membership of any Authority or Body of the University means a permanent appointment made under s 29(1) of the University Act It does not include temporary or officiating appointment made either under s 29(3) or under Or 26 of Ch XII

Wherefore if two lecturers are appointed permanent Readers on the same date the relative seniority between them will rest on and be determined, as provided for by cl 205 of the Statutes according to seniority in age irrespective of the period during which they officiated as Readers by virtue of an appointment under Or 26 of Ch XII on a duty allowance which is valid

Judgment in *Dr S Rafiq Husain* v *Executive Council* (1) holding appointments under Or 26 of Ch XII invalid not followed on the ground of its being *per incuriam* since the relevant statutory provision was not brought to the notice of the Court

Observation to the contrary in *University of Allahabad* v *Lakshmi Sagar Varshney* (2) held to be a passing reference on the point and unnecessary for the disposal of the case

Dr Prem Nath v *Vice Chancellor* (3) applied

Civil Miscellaneous Writ No 192 of 1967

S N Kacker, L P Natham and *Sri Dhar* for the Petitioner

G P Singh and *J C Bhardwaj*, for the Opposite Parties

(1) Civil Misc Writ No 5295 of 1965 decided on 9 8 1965

(2) Special Appeal no 402 of 1966

(3) A I R 1959 All 618

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SATISH CHANDRA, J —Sri B M Singh, the petitioner, claims that he is senior to Dr B N Asthana, respondent no 3 and prays that the respondents be directed to treat him so and accord him the appropriate status and privileges

The petitioner was in 1947 appointed to the post of lecturer in the department of Commerce of the University of Allahabad In 1949 he was made permanent Dr Asthana, respondent no 3 was appointed a lecturer in the same department in 1948 and was made permanent in 1950 Sri D N Elhance who was the Reader of this Department, went on leave The Vice Chancellor appointed the petitioner as an officiating Reader in this leave vacancy from 4th December 1962 to 30th April 1963 On 11th August, 1963, the Executive Council approved the Vice Chancellor's sanction of the officiating allowance of Rs 50 per month as Reader to the petitioner for this period The Reader of the department again went on leave and the petitioner was appointed as officiating Reader from 8th July, 1963 and this appointment continued till 11th September, 1966 The petitioner was paid the officiating or Duty Allowance of Rs 50 per month for this period

In 1962 a second post of Reader was created in the Commerce Department and Dr B N Asthana respondent no 3 was appointed as officiating Reader on the second post from 16th July 1963 This appointment continued till 11th September, 1966 on payment of the allowance of Rs 50 per month On 10th September, 1966 the Executive Council resolved to appoint the petitioner as well as Dr B N Asthana as Readers substantively and placed them on probation for two years These appointments took effect from 12th September, 1966 The Registrar of the University issued a list of

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Members of the Faculty of Commerce under cl 78 of the Statutes of the University It placed Dr B N Asthana at serial no 1 and the petitioner at serial no 2 in the list of Readers This indicated that in the opinion of the Registrar the third respondent was senior to the petitioner Under Statute no 69 one Reader from each department is entitled to be a member of the Academic Council every year in order of seniority In virtue of the list issued by the Registrar the petitioner felt that he has been deprived of the privilege of being a Member of the Academic Council for the first year though he was senior to Dr Asthana The petitioner thereupon made representations to the Registrar but to no effect Hence he has come to this Court

From the counter affidavit filed by the Registrar of the University it appears that the Vice Chancellor considered the petitioner's representations as well as the counter representations made by the third respondent and on 16th January 1967 provisionally decided that respondent no 3 was senior to the petitioner The matter was referred to the Executive Council and it was placed in the agenda of its meeting held on 23rd December, 1966 but this item could not be reached It was again placed in the agenda of the next meeting to be held on 4th February 1967 but in the meantime the petitioner filed the present writ petition In view of the pendency of the writ petition the Executive Council postponed consideration of this matter

At the threshold the question is whether the petitioner should be directed to await the decision of the Executive Council which is seized of the dispute between the parties The Executive Council does not appear to be anxious to decide the matter This Court had issued no interim order The Executive Council

was free to take a decision but it postponed considera tion of this matter May be it wished that the dispute be adjudicated in this Court Under the circumstances I am not inclined to dismiss the petition on this ground

The petitioner does have an alternative remedy under s 42 of the Allahabad University Act, 1921 whereunder any question whether any person is entitled to be a Member of any authority or other body of the Univer sity can be referred to the Vice Chancellor for decision The existence of an alternative remedy is not an absolute bar to the exercise of jurisdiction under Art 226 of the Constitution The questions raised in the present case are purely of law and of some intricacy The dispute of a present nature arises frequently in the University In the counter affidavit it has been stated that the Vice Chancellor decided many cases like the present one It is evident in the interest of justice desirable that this point be settled at this stage rather than let it linger on before the Executive Council and the Chancellor before deciding it when it comes up again in this Court

Statute 205 laws down the principles for determining seniority amongst teachers Under it the length of ser vice from the date of the substantive appointment counts for seniority The petitioner contends that in this statute the word substantive includes an officiating appointment The petitioner has a longer officiating service to his credit and as such he is senior to Dr Asthana On the other hand, it was urged on behalf of Dr Asthana that an appointment on the recommenda tion of the Selection Committee and on probation alone is a substantive appointment As officiating appoint ment is not substantive For the University a third view point was pressed It was submitted that an officiating appointment made under s 29(3) of the Allahabad University Act is within the meaning of the term substantive But it was urged that the petitioner was

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not appointed in an officiating capacity only additional duties were placed on him under Ordinance XXVI of Chap XII on payment of the duty allowance This service was not officiating service and hence could not be substantive

In my opinion neither the petitioner nor the respondent were appointed to officiate as Readers under s 29(3) They were both appointed under Ordinance XXVI Further, substantive appointment in Statute 20b means a permanent appointment only A permanent appointment which is made on the recommendation of the Selection Committee and in which the incumbent is placed on probation, does not include either the officiating appointment under s 29(3) or the appointment under Ordinance XXVI The petitioner as well as the third respondent were both appointed as Readers on 12th September, 1966, and placed on probation Thus the substantive appointment of both took place on the same date The substantive service of both being equal cl V of Statute 205 will apply and respondent no 3, who is admittedly senior in age will be senior of the two

The questions to be determined are whether the services rendered by the petitioner and the third respondent as Readers were under s 29(3) of the Act or under Ordinance XXVI and whether officiating service is substantive within the meaning of Statute 205 The Allahabad University Act and the Statutes and Ordinances have been amended more than once To appreciate their true import it is feasible to notice the historical development of the provisions relating to appointment and conditions of service of teachers

The golden rule of construction of statutes firmly established since 1584 when Lord Coke decided *Heydon's* case (1) is that

> for the sure and true interpretation of all statutes in general (be the penal or beneficial,

(1) (1584) 3 Ch 7a at p 8b

restrictive or enlarging of the common law) four things are to be discerned and considered

(1) What was the common law before making of the Act

(2) What was the mischief and defect for which the common law did not provide

(3) What remedy the Parliament hath resolved and appointed to cure the disease of the Common Wealth and

(4) The true reason of the remedy and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the intent of the makers of the Act *pro bono publico*

Lindley M R in 1898 found the rule as necessary now as it was when Lord Coke reported *'Heydon's* case (1) Our Supreme Court has held that this rule of construction is equally applicable in the present times per Das J in *Bengal Immunity Co v State of Bihar* (2)

Originally s 29 of the Allahabad University Act 1921 provided that the teachers of the University shall be appointed in such manner as is prescribed by the Statute and the Ordinances Under Chap XIV of the Statute the teachers were of three grades namely Professor Reader and Lecturer The appointments to all these grades were to be made on the recommendation of the committee of selection of the Faculty Under cl (2) of the transitory Ordinances all new appointments to

(1) 1898 2 Ch 98 at p 98 (2) A I R 1955 S C 662 (676)

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the teaching staff were to be made on probation for three years and the appointee was to be confirmed at the end of three years active service. Cl. (3) provided that the date of confirmation within a particular grade shall determine seniority in that grade. Cl. (4) was as follows:

> When a teacher who has been serving in a lower grade is appointed to a higher grade his new appointment in the higher grade shall be on probation for three years.
>
> During his period of probation in the higher grade he shall hold a lien on his post in the lower grade. Appointment in the higher grade on probation or after confirmation will not affect his privileges as regards leave nor will it affect the continuity of his service.

Cl. (8) of the Ordinances authorised the Executive Council to appoint a research scholar attached to the department in a temporary vacancy in the existing cadre of teachers provided the Vice Chancellor certifies that other arrangements of carrying on the work of the department are not possible and that the efficiency of the department will suffer if the temporary vacancy is not filled. The provisions of these Ordinances are still in force. Cl. (2) is now Statutes 140 and 141. Cl. (3) is now Ordinance 3 in Chap. XI and clause (4) is Ordinance 4 in Chap. XI relating to appointment of teachers. The original cl. 2 has been modified by Statute nos. 140 and 141. The initial period of probation is now two years the Executive Council having the power to extend it by one year. Cl. 3 has been retained in the same language but the period of probation stands reduced to two years by virtue of Cls. 140 and 141 of the Statutes. Cl. 8 has also been retained in identical terms as Ordinance no. 7 of Chap. XI.

Chap XV contained Ordinances relating to conditions of service, leave etc Ordinance 26 stated that

> The amount of allowance, if any to be paid to an officer or teacher who undertakes additional duty on account of absence on leave of another officer or teacher shall be decided in each case by the Executive Council

This Ordinance also continues in force but has been placed in Chap XII

On 6th September 1924 the Executive Council resolved that the additional allowance should be given only where the person concerned has to undertake work involving additional serious responsibility The amount should not be more than Rs 50 per month provided the officiating period is not less than six months With effect from 7th March 1925 the Executive Council modified this resolution and provided that a lecturer who officiates as a Reader should be granted an officiating allowance (duty allowance) of Rs 50 per mensem and a Reader who officiates as a Professor an allowance of Rs 100 per mensem No officiating allowance shall be drawn unless the officiating period lasts for at least 3 months

In 1948 the question relating to officiating arrangement and leave vacancy was again considered by the Executive Council A sub-committee was appointed and after considering its report the Executive Council on 24th February 1951 resolved that in filling up vacancies of less than three months duration the senior most teacher in the lower grade shall be appointed provided he has teaching experience of post graduate classes and leave vacancies of three months or more shall be filled up in the manner prescribed for filling up permanent vacancies A question arose as to the status of a lecturer if he has officiated as a Reader on payment of

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the Duty Allowance The matter was referred to Sri Pyare Lal Banerji, the Advocate General, U P for his opinion The learned Advocate General in his opinion stated that a lecturer who is appointed to officiate as a Reader on an allowance of Rs 50 but continues to draw his salary of lecturer and also the increment of his grade, must continue to be classified in the category of lecturer and not in the category of Readers The counter affidavit filed on behalf of the University states that the University has been acting on this opinion The officiating arrangements of teachers in a vacancy caused by another teacher taking leave are governed by Ordinance 26 and have been treated to be so by the University

The Act or the statutes and Ordinances did not provide for making an officiating appointment If a teacher took leave the University could either appoint a Research Scholar under cl 8 of the Transitory Ordinances or ask another teacher to take additional duties under Ordinance 26 The service of a teacher in the higher grade on payment of the allowance, was not to be counted for seniority because under cl 3 of the Transitory Ordinances seniority was to be determined by the date of confirmation Confirmation was permissible only in permanent appointments at the end of the period of probation

These provisions did not permit permanent service on probation to be counted for purposes of seniority Again these provisions did not take into account the case of teachers who were appointed in this University after some teaching experience in other Universities They were not entitled to tack on their previous services for claiming seniority

In 1954 the Act was amended by the Allahabad University (Amendment) Act No 5 of 1954 S 29 was substituted by a new section By sub s (3) the Execu-

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tive Council was authorised to make officiating appointments in a vacancy caused by the grant of leave to an incumbent for a period not exceeding 10 months without reference to the selection committee Ordinance 17(A) of the Ordinances of Chap XIV relating to appointments of teachers provides the same rates of salary in case of all appointments to the post of Professor Reader and Lecturer The officiating appointments made under s 29(3) would therefore carry the pay of that post as distinguished from the duty allowance payable under Ordinance 26

The petitioner as well as respondent no 3 received only the duty allowance while they acted as Readers They were not paid the salary which the post of Reader carried The counter affidavit asserts and establishes that the petitioner was treated as a lecturer although and represented the lecturers constituency in matters of representation to the various bodies of the University like Academic Council The use of the word officiating in the resolution of the Executive Council appointing the petitioner was in a loose sense The appointment was governed by Ordinance 26 and was not in the exercise of the power conferred by s 29(3) The petitioner neither received the pay nor the status of a Reader The same was the case with respondent no 3 For the petitioner reliance has been placed on the decision of Hon R S Pathak, J in *Dr S Rafiq Husain* v *Executive Council* (1) In that case Dr Rafiq Husain was allowed to officiate as a Reader on payment of duty allowance of Rs 350 per month The learned Judge held that such an appointment could be made only under s 29(3) and since it contravened the provisions of that section as well as Statute 132, the appointment was

(1) Writ Petition No 5985 of 1968 decided on 9 8 1965

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invalid The attention of the learned Judge was not invited to Ordinance 26 His Lordship observed

> It seems to me that sub s (3) makes exhaustive provision for the making of officiating appointments No other provision in this behalf has been indicated by the respondents If the contention of the respondents is accepted and it is held that the impugned order does not fall within sub s (3) then because of the absence of a provision countenancing such order it must be held to be invalid as being *ab initio* without power

The attention of the Court not having been invited to the relevant statutory provisions the judgment will be per incurium and will have no efficacy as a precedent

I may now deal with the ambit of the term sustantive' in Statute 205 S 42(1) of the amending Act of 1954 conferred powers on the Governor to frame statutes Of the statutes so framed statute 1 (B) related to seniority of teacher Cl (1) read as follows

> The seniority of teachers for the purpose of membership of the Authorities and bodies of the University shall be determined by the length of their service reckoned in the manner hereinafter laid down subject to the following conditions
>
> (i) Service rendered in each rank as Professor, Reader or Lecturer shall be counted from the date of substantive appointment in that capacity
>
> Provided that when a person is appointed by the University to officiate in a post or is appointed to a temporary post and is subsequently confirmed in it without a break in his service his original officiating or temporary

appointment shall be deemed to be in a substantive capacity

Provided further that when a person holding the post of Professor Reader or Lecturer in another teaching University or in a Research Institute or Laboratory established or recognised by the Central Government or a State Government or in a college affiliated to a University established by law for teaching for post-graduate degrees in the subject which the teacher in question professes is appointed to a post corresponding rank in this University the period of service of such person in that rank in a substantive capacity in the previous institution shall also be taken into account

Explanation—Service in a temporary post or in officiating capacity in any other University or institution shall not count for the purpose of this Statute

(ii) The period of service in each capacity shall be reckoned in whole months and fractions of a month shall be ignored

(iii) A period of leave without pay shall not count as a period of service unless it is declared by the Executive Council to have been spent in study or research with its approval

(iv) Where more than one person becomes entitled under this Statute to count the same period of service for the purpose of seniority seniority among such persons shall be determined by age"

This statute for the first time used the phrase substantive appointment The first proviso by a fiction in

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cluded officiating appointment within the meaning of the word substantive, provided the incumbent was confirmed in that post without a break in service Hence, an officiating appointment for a term where after the incumbent reverted to his original post, was not treated as substantive appointment

The cases of teachers coming from other Universities were provided by the second proviso It stated that when a person holding a post in another University was appointed to a post in the corresponding rank in this University the period of service in that rank in a substantive capacity in the previous institution shall also be taken into account This was followed by an Explanation which provided that service on a temporary post or in officiating capacity in another University or institution shall not be counted The Explanation was, to my mind occasioned because of the possibility that under the rules of the other Universities or institutions a person occupying a temporary post or in an officiating capacity may have been treated to be in a substantive capacity The Explanation excluded this contingency The Explanation could not be implication mean that temporary officiating service in this University would be counted because this matter was specially dealt with by the first proviso

This provision discriminated against a person coming from another University If he was holding a temporary post or was officiating in a post when he was appointed in this University, and later confirmed without break in his service he would not be entitled to tack on such service in the previous institution, because the Explanation did, but the first proviso did not, apply to him

In 1958 this Statute was repealed and re enacted as Statute 205 Now it read as follows

'205 The seniority of teachers for the purpose of holding an office or for membership of the

Authorities and Bodies of the University shall be determined by the length of their service reckoned in the manner hereinafter laid down subject to the following conditions

(i) A Professor shall be regarded as senior to Reader and a Reader as senior to a Lecturer as the case may be

(ii) Service rendered in each rank as Professor or Reader or Lecturer shall be counted from the date of substantive appointment in that capacity

Provided that in the Faculties of Arts Science Commerce and Law the teachers who were appointed as Readers in a substantive capacity before March 22 1958 shall be deemed to have put in continuous service as Readers from the date of their substantive appointments as Readers and in the case of Lecturers whether appointed before March 22, 1955, or subsequent to that date as Assistant Professors, the total length of continuous service in a substantive capacity whether as a Lecturer or as an Assistant Professor shall be reckoned towards determining their seniority as Lecturers

Provided further that when a person holding substantively a post of corresponding rank in any of the State Universities or in the Colleges associated or affiliated thereto or in a Research Institute established or recognised by the University which extend similar treatment to the teachers of this University is appointed to a post of corresponding rank in this University the period of service of such person in that rank in a substantive capacity

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in the previous institution shall be added to his length of continuous service

Provided also that when a person holding substantive post of corresponding rank in any University other than the Universities established by the State of Uttar Pradesh or the Colleges affiliated or associated thereto which extend similar treatment to teachers of this University is appointed by this University the services rendered by that person in that University or the Colleges associated or affiliated thereto shall also be counted for seniority in this University

Provided further that when a person holding substantive post of a teacher of the University joins the armed forces of the country during the period of National Emergency (1962) after 20th October 1962 and is granted special leave without pay the period of this leave shall be counted as period of service for purposes of seniority

Explanation—Service in a temporary post or in officiating capacity in any other University or institution shall not count for the purpose of this statute

(iii) The period of service in each capacity shall be reckoned in whole months and part of a month shall be ignored

(iv) A period of leave without pay except in case of leave for joining armed forces during the period of National Emergency 1962 shall not count as a period of service unless it is declared by the Executive Council to

have been spent in study or research with its approval

(v) Where more than one person in a service becomes entitled under this Statute to count the same period of service for the purpose of seniority the relative seniority among such persons shall be determined on the basis of seniority in age

It will be seen that sub cl (i) of the previous statute was retained as sub cl (ii) The first proviso which permitted the deeming of temporary or officiating appointments as substantive was repealed The second proviso relating to persons coming from other Universities was split up into two provisos One dealt with the Universities in the State In these cases service in the same rank in a substantive capacity alone in the previous institution was to be counted The second proviso dealt with persons coming from Universities or Institutions outside Uttar Pradesh In such cases the relevant provision was

> 'The services rendered by that person in that University or College shall also be counted for seniority in this University'

Here there was no restriction that service in a substantive capacity alone shall be counted The Explanation was also retained The question is to find the intention in deleting the first proviso but retaining the Explanation

It has been urged that the first proviso was deleted and the Explanation retained in order to treat temporary and officiating services rendered in this University alone as substantive I am unable to endorse this viewpoint This interpretation will deepen the mischief which the pre existing provisions created It

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with the existing invidious discrimination against teachers coming from other Universities, still greater temporary or officiating service in this University will be deemed to be substantive whereas same service rendered in another University immediately prior to appointment in this University would not be counted for seniority In my opinion the intention was just the contrary

Both these provisos in statute 20(1) dealing with persons coming from other Universities are confined to only those Universities which extended similar treatment to teachers of this University The intention appears to be to recognise past service in such Universities alone, and to make the mutuality real by removing the discrimination against teachers coming from such Universities Appointees from both sources (direct recruits and from such other Universities) were to be treated as equals To achieve this the first proviso was repealed and the other confined to Universities which extended mutuality The result was that temporary or officiating service in both classes of cases was not to be treated as substantive

The question then arises as to why was the Explanation retained The pre existing reason about the rules prevailing in other Universities still remained An additional reason was furnished by the different language used in the proviso dealing with persons coming from Universities outside Uttar Pradesh In such cases the entire service rendered by a person in that University could be counted for seniority in this University This could include temporary or officiating service as well To exclude these the Explanation was all the more necessary The Explanation previously governed the persons coming from other Universities After the

amendment, its object and field of operation remained the same It dealt with those cases only and explained the ambiguities which were inherent in them There was no ambiguity in the provisions governing temporary or officiating appointments in the University of Allahabad These provisions did not make temporary or officiating service as permanent or substantive To read an implication to that effect in the Explanation will instead of explaining any thing bring in by the back door the vice of discrimination and also nullify the effect of the repeal of the first proviso

Learned counsel for the petitioner has invited my attention to the decision of a Division Bench in *University of Allahabad* v *Lakshmi Sagar Varshney* (1) In that case the Division Bench observed that the Explanation necessarily implies that service in a temporary post or service in an officiating capacity would be counted if such service has been rendered in this University This was a passing observation not necessary for the decision of that case The dispute was between two Readers Both had been held to have been appointed in clear vacancies and on probation Neither had any temporary or officiating capacity to count for their seniority The attention of the Bench was also not invited to a contrary Division Bench decision of this Court in *Dr Prem Nath* v *Vice Chancellor* (2) where an identical statute of the Lucknow University came up for interpretation The Division Bench held at page 621

> It is not possible to agree with the contention that the Explanation to which reference has been made above must be taken to imply that it is only

(1) Special Appeal No 408 of 1966 (2) A I R 1969 All 618

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officiating capacity or temporary capacity in another University which will not count towards seniority

Their Lordships noted that the deletion of the first proviso made a vital change They observed

> As we have already pointed out in 1956 Statutes in the provision relating to seniority it was clearly provided that where a person was appointed to officiate in a post including a temporary post and was subsequently confirmed in it without a break in his service, his original officiating or temporary appointment was to be deemed to be in a substantive capacity The position is changed now

The Division Bench was of the view that the deletion of the first proviso meant that the temporary or officiating service was not intended to be included in substantive service

Reliance was in this connection placed on the resolution of the Court of Allahabad University passed on December 1 1963 This resolution was in relation to the provisions in the statutes in Chap XVII relating to provident fund and stated that in the opinion of this Court a substantive appointment includes all appointments whether temporary or permanent except those held on an officiating basis as contemplated in the resolution of the Executive Council no 73 of February 4 1951 no 60 of March 18 1933 and no 176 of August 6, 1925 For the University it was suggested that according to this resolution only the appointments on payment of duty allowance under Ordinance 26 are excluded from being treated as substantive The resolution is ambiguous It treats temporary or permanent appointment as substantive It does not expressly include officiating appointments under s 29(3) Such officiating

appointments are neither temporary nor permanent If the submission made on behalf of the University is accepted then even the appointment of a Research Scholar on a temporary vacancy under Ordinance 7 of Chap XI would be substantive All these aspects could not be considered by the Court because it was not considering statute 205 but only the statutes relating to provident fund In my opinion this resolution does not represent the true import of statute 205

On the basis of *Dr Prem Nath's* case (1) it was urged that substantive appointment within the meaning of Statute 205 means a confirmed appointment The Division Bench held that substantive capacity implies that the holder thereof has a lien on the post It relied upon the observations of the Supreme Court in *Parshotam Lal Dhingra v Union of India* (2) *Dhingra's* case (2) related to Government servants where the provisions in the rules are different The Division Bench did not mention the provisions in the Lucknow University Acts or Statutes relating to lien May be they were similar to Government services In the Allahabad University there is a specific provision about lien Under the old cl 4 of the Transitory Ordinances and the present Ordinance 4 in Chap XI a person appointed to a higher grade on probation continues to hold his lien on his post in the lower grade If the intention was to count service only from the date of confirmation when lien is obtained to the higher post statute 205 need not have used the term substantive but could have easily used the words from the date of confirmation to avoid any confusion or inconsistency with Ordinance 3 Again statute 205 was superfluous because Ordinance 3 in Chap XI was already there to provide that seniority in a grade would be determined with reference to the date

(1) A I R 1959 All 618 (2) A I R 1956 S C 36

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of the confirmation In my opinion statute 205 deliberately used the term substantive and not the word confirmation, because under the Statutes and the Ordinances prevailing in the Allahabad University confirmation is not an appointment

A teacher under s 29(1) read with statute 125, is appointed on the recommendation of the Selection Committee Statute 141 requires every such appointment to be on probation Under statute 141 a teacher is at the end of probation confirmed This confirmation is not a fresh appointment The original appointment is confirmed Cl 8 of the Ordinances in Chap XI relating to appointment of teachers says

> In the case of permanent appointment of a teacher in the cadre, leave and increment shall be counted from the date on which he assumes duty of the post The date of confirmation within a particular grade shall determine seniority in that grade

This Ordinance uses both the terms permanent and confirmation and shows that the original appointment in the cadre is the permanent appointment which is later on confirmed The words substantive appointment in statute 205 refers to this appointment made under s 29(1) read with statute 125 It may be noticed that the Division Bench deciding *Varshaney's* case (1) also accepted the view that confirmation does not render an appointment substantive

In my opinion an officiating appointment under s 29(3) or an appointment under Ordinance 26 is not a substantive appointment within meaning of statute 205 and the Explanation does not by implication enlarge the connotation of the term substantive The petitioner as well as the third respondent acted as Readers under

(1) Special Appeal No 403 of 1966

Ordinance 26. They were not entitled to count this service for the purposes of seniority. They were both appointed to the cadre of Readers on 12th September, 1960. Both of them had the same period of service to count. In view of cl. (a) of Statute 20 the seniority will under the circumstances be determined on the basis of seniority in age. Respondent no. 3 was admittedly senior in age to the petitioner. He was hence rightly treated as senior.

In a short term vacancy the University can act in two ways. It can ask another teacher to take additional duties on payment of an allowance under Ordinance 26. It can also make an officiating appointment under s. 29(3) which entails payment of the salary of the post. There are no provisions to guide the Executive Council in choosing either of the two. The Executive Council can act at its sweet will. This may lead to a charge of discrimination. It is only hoped that the concerned powers will look into this state of affairs and make suitable provisions.

In the result the petition cannot succeed. It is accordingly dismissed but without any orders as to costs.

Petition dismissed.

CRIMINAL REVISION

Before Mr Justice S D Khare and Mr Justice Yashodanandan

1967 March, 3rd

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STATE — OPPOSITE PARTY

Code of Criminal Procedure, *(Act V of)* 1898 *s* 197—*Indian Penal Code (Act XLV of)* 1860 *s* 218—*Prosecution of Lekhpal under s* 218 *I P C in respect of Khasra entries—Whether prior sanction of Governor necessary—Essentials of offence under s* 218

In preparing the Khasra the Lekhpal no doubt acts in his official capacity and in the discharge of public duties as a public servant To that extent the case is duly covered by the provisions of s 197 of the Code of Criminal Procedure In view however of the fact that the power of dismissal from service of a Lekhpal which is implicit in the power of appointment vests in the Assistant Collector the other condition of that section is not fulfilled

A Lekhpal may therefore be prosecuted of an offence under s 218 I P C regarding Khasra entries without the prior sanction of the Governor

A Lekhpal is not required to make a detailed enquiry at the time of *partal* and as such in order to sustain his prosecution under the aforesaid section it will not suffice to prove that the entries were wrong or as a result of negligence It is necessary to establish the requisite dishonest intention on the part of the Lekhpal to secure his conviction

Criminal Revision No 1623 of 1964 connected with Criminal Revision No 36 of 1965 against the order of R N Misra Sessions Judge, Varanasi dated, 23rd September, 1964

T Rathore, for the Applicant

R K Shukla, for the State

The following judgment of the Court was delivered by—

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S D KHARE, J —In both these criminal revisions, which have come before us for disposal on a reference made by a learned single Judge it has to be considered whether the bar of s 197 Cr P C will apply in the case of a Lekhpal in Uttar Pradesh and he cannot be prosecuted for having committed an offence under s 218 I P C without first obtaining the sanction of the Governor Such sanction would be necessary if he is a public servant not removable from his office save by or with the sanction of the State Government and the offence alleged to have been committed by him had been committed by him while acting or purporting to act in the discharge of his official duty The learned single Judge allowed this plea to be raised for the first time at the stage of revision because it affects the question of jurisdiction

In both these cases the previous sanction of the Governor had not been obtained before launching the prosecution

The prosecution story in Criminal Revision No 1623 of 1964 briefly stated was that the complainant Rampat was the tenant of plot no 769, measuring 35 decimals, situate in village Kharawan district Varanasi He had become its bhumidhar in the year 1949 and had continued to remain in the possession in the years 1367 and 1368 F and even thereafter The accused who was a Lekhpal, colluded with Sheojog (since dead) a brother of Rampat, and in order to cause wrongful loss or injury to the complainant and wrongful gain to Sheojog and his son Chandrabhushan, made an entry in the Khasra that Sheojog was in actual possession of that plot during the years 1367 and 1368 F The charge against the applicant in Criminal Revision No 36 of 1965 was that sometime between February 17, 1963 and June 15,

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1963 he had wrongfully framed the Khasra for the year 1370 F of village Sanetua within police circle Qasimabad district Ghazipur by adding the words *sirf kharif* after the entry of possession existing in favour of complainants Bechan Rai and Jeot Rai against plots nos 2378 2380 and 2381 of that village and that he did so with intent to cause wrongful loss to them and wrongful gain to Thegum Nonia of that village

In both the cases the courts below have held that the complainants were in possession of the plots in question and the Lekhpal had knowingly made incorrect entries in order to cause wrongful loss to them and wrongful gain to other party

It is the duty of the Lekhpal who is admittedly a public servant to make *partal* and, on the basis of the *partal* to make entries in the Khasra regarding the names of persons actually found to be in possession of the various plots The Lekhpal, therefore could—and in fact did—in reply to the charge plead that the entries made by him in the revenue records were genuine and in regular discharge of his public duties It is, however contended that the duty of the Lekhpal was to make correct entries in the revenue records and not to make incorrect entries in them knowingly so as to cause wrongful gain to one party and wrongful loss to the other

The law on the point is very clear No question of sanction arises under s 197, Cr P C unless the act complained of is an offence The point that has to be determined in each case is whether the offence was committed in the discharge of official duty Thus there must be a reasonable connection between the act and the official duty If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then the sanction

under s 197(1), Cr P C would be necessary However if there was no necessary connection between them and the performance of those duties and the official status furnished only the occasion or opportunity for the act no sanction would be required

It was held in the case of *H H B Gill* v *The King* (1) that—

> A public servant can only be said to act or to purport to act in the discharge of his official duty if his act is such as to be within the scope of his official duty Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe though the judgment which he delivers may be such an act nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining though the examination itself may be such an act The test may well be whether the public servant if challenged can reasonably claim that what he does, he does in virtue of his office A public servant charged with an offence under s 120 B read with s 161 Penal Code cannot justify his act of receiving bribe as an act done by him by virtue of the office that he held No sanction under s 197 is therefore necessary for the institution of proceedings against a public servant for an offence under s 120 B read with s 161, Penal Code.'

The view taken in *H H B Gill* v *The King* (1) was followed by the Privy Council in *Albert West Meads* v *The King* (2) and reaffirmed in *Phanindra Chandra* v *The King* (3) and adopted by the Supreme Court in *R H Mudhaus* v *State of West Bengal* (4)

(1) A I R 1948 P C 128 (2) 75 I A 186
(3) 76 I A 10 (4)

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It was observed in the case of *Satwant Singh* v *State of Punjab* (1) that

> "Where a public servant commits the offence of cheating or abets another so to cheat the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty as such offence has no necessary connection between it and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offence"

However it is not the intention of law that sanction under s 197 Cr P C may not be necessary at all in any case whatsoever on the hypothesis that the commission of an offence can never form part of one's official duties The case of *Shreekantiah Ramayya Munipalli* v *State of Bombay* (2) is an authority for the proposition that if s 197, Cr P C is construed too narrowly it could never be applied be cause it was no part of the duty of a public servant to commit an offence and never could be The section and its language must be given meaning

In the case of *Amrik Singh* v *State of Pepsu* (3) and *Matajog Dobey* v *H C Bhari* (4) it was held that if the acts complained of are so integrally connected with the duties attaching the office as to be inseparable from them then sanction under s 197 would be necessary It was however again emphasised that no question of sanction will arise where the official status furnishes only the occasion or opportunity for the criminal acts complained of

In this connection reference might be made to the case of *Hori Ram Singh* v *Emperor* (5) One of the

(1) A I R 1960 S C 266 (2) A I R 1956 S C 287
(3) A I R 1965 S C 909 (4) A I R 1956 S C 44
(5) A I R 1939 F C 43

points to be considered by the Federal Court in that case was whether an offence under s 477 A I P C (falsification of accounts) would be an act done by the accused in his official capacity even though it was done fraudulently and in violation of the duty to maintain correct amounts It was held that in respect of a charge under s 477 A, I P C the official capacity involved is in the very act complained of as amounting to a crime became the gravamen of the charge is that the accused acted fraudulently in the discharge of his official duty and, therefore the consent of the Governor would be necessary for starting proceedings against the accused under s 477 A I P C There appears to be no reason why for purposes of obtaining previous sanction of the Governor under s 197, Cr P C an offence under s 218 I P C should be treated on a different footing than an offence under s 477 A I P C Both the offences involve dereliction of duty by a public servant in the discharge of his official functions

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In both the revisions now before us the accused was undoubtedly a public servant The offence with which he was charged related to the preparation of revenue records to wit, Khasras It was part of his duty as a public servant to make *partal* and to prepare Khasras It is, therefore, plain that the act of the preparation of the Khasra was an act done by the Lekhpal in his official capacity and in the discharge of the public duties as a public servant This mistake in the preparation of the Khasra could either be due to negligence or be intentional In either case it would have been open to the accused to plead that he had made the impugned entries in the Khasra in the discharge of his duties as a public servant Therefore applying the tests which have been laid down in the cases of *H H B Gill* v *The King* (1) *Amrik Singh* v *State of Pepsu* (2) and *Matajog Dubey*

(1) A I R 1948 P C 128 (2) A I R 1955 S C 309

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v. *H. C. Bhari*, the sanction under s. 197(1) Cr. P. C. would be necessary to avoided the Lekhpal was a public servant removable only by the State Government.

The next point to be considered is whether a Lekhpal in Uttar Pradesh is a public servant who is not removable from his office save by or with the sanction of the State Government or some higher authority. Lekhpals in Uttar Pradesh are appointed under the Lekhpals Service Rules 1958 published in the *U. P. Gazette*, dated May 17, 1958. It is provided in r. 2 that the Lekhpals service is a non gazetted subordinate service. R. 7 provides that whenever the *halqa* of a Lekhpal falls vacant the Assistant Collector shall appoint thereto the senior most candidate on the list maintained under para 6(1) provided further that the order passed by the Assistant Collector shall be appealable before the Collector whose orders shall be final. R. 16 lays down that all persons on appointment as Lekhpals shall be placed on probation for a period of two years and the Assistant Collector may at his discretion extend the period of probation in individual cases for a period not exceeding one year. Cls. (*d*) and (*e*) of r. 16 read as follows:

> (*d*) where it transpires at any time during or at the end of the period of probation or extended period of probation that a Lekhpal has not made sufficient use of his opportunities or has otherwise failed to acquit himself satisfactorily his service shall be terminated after observing the formalities prescribed in r. 5(8) of the Civil Services (Classification Control and Appeal) Rules without entitling him to any compensation.
>
> (*e*) A probationer shall be confirmed in his appointment by the Assistant Collector at the end of the period of probation or the extended period of

(1) A.I.R. 1956 S.C. 44 (2) A.I.R. 1945 P.C. 18.

probation if his work and conduct are found satisfactory. The period of probation shall continue till the order of confirmation is passed or the probation is terminated.

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It has not been specifically mentioned in cl. (d) of r. 16 that the Assistant Collector shall have the powers to remove a Lekhpal under that clause. However, the rule read as a whole makes it clear that the intention must have been that the powers under cl. (d) of r. 16 must also be exercised by the Assistant Collector who is authorised to confirm a Lekhpal in his appointment under cl. (e) of r. 16.

In order to construe the rules of the Lekhpals Service Rules, 1958, it will be convenient to read r. 28(2) of the rules thus:

> When it is proposed to dismiss or remove a Lekhpal as a measure of punishment he shall first be suspended and shall make over his papers and records to the Supervisor Kanungo or to such other person as the Supervisor Kanungo may indicate within one week from the receipt of the order. In either case the Supervisor Kanungo shall be responsible for seeing that the Lekhpal has made over all his records and papers.

R. 29 provides:

> A Lekhpal will be punished by the Collector or the Assistant Collector for misconduct or neglect of duty by fine not exceeding three months pay."

R. 28(2) does not specifically mention that the Assistant Collector shall be empowered to dismiss or remove a Lekhpal. However, if the rules are read as a whole there can be no doubt that the intention was

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that the said powers should be exercised by the Assistant Collector and no one else It is significant to note that the rules nowhere lay down that in cases where it is proposed to dismiss or remove a Lekhpal the proceedings need be submitted by the Assistant Collector to any higher authority for passing final orders

Prior to the reorganisation of the services of Lekhpals the patwaris, who used to do the same work as the Lekhpals were governed by the rules framed under s 234(*b*) of the Land Revenue Act, 1901, and contained in the Land Records Manual It was provided in those rules (*vide* r 1) that the punishing authority shall be the Collector, and the Assistant Collectors in charge of sub-divisions were also authorised to exercise the powers of the Collector It was specifically mentioned in r 13 that a patwari may be removed or dismissed by the Collector or the Assistant Collector in charge of the sub division on any of the grounds mentioned therein R 14 provided that a patwari could also be punished by the Collector or Assistant Collector in charge of a sub division for misconduct or neglect of duty by fine not exceeding three months pay by reduction from a higher grade to a lower grade or by loss of seniority within his grade

The Lekhpals Service Rules 1958 virtually followed the same pattern which existed in the rules framed earlier under s 234(*b*) of the Land Revenue Act 1901, with this exception only that

(*a*) the Assistant Collectors were primarily made appointing authorities and

(*b*) it was not mentioned in the rules framed under Art 309 of the Constitution of India that the Assistant Collectors shall be the authority to dismiss or remove the Lekhpals

It has, therefore to be considered whether under the Lekhpals Service Rules 1958, the State Government conferred only the power of appointment on the Assistant Collectors reserving for itself the power to dismiss the Lekhpals by its own orders or whether the power to appoint given to the Assistant Collectors by implication also conferred on them the power to remove or dismiss the Lekhpals

It has been contended by the learned counsel for the applicant that the State Government must be deemed to have reserved for itself the power to remove or dismiss the Lekhpals because it did not specifically confer that power on the Assistant Collectors In our opinion there is no force in this contention

Art 311(1) of the Constitution of India dealing with the dismissal removal or reduction in rank of persons employed in civil capacities under the Union or a State provides as follows

> No person who is a member of the civil service of the Union or an All India Service or a civil servant of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed

There existed a similar provision (*vide* s 240) in the Government of India Act 1935 also The constitutional guarantee therefore extends only to this extent that the authority dismissing or removing any person holding a civil post under a State shall not be an authority subordinate to that by which he was appointed

S 16 of the General Clauses Act provided that where a power of appointment is conferred by any Act or Regulation then unless a different intention appears the authority having the power to make the appointment

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shall also have power to suspend or dismiss any person appointed by it in exercise of that power. However the provisions of s. 16 of the General Clauses Act will not apply to the interpretation of the *rules* framed under Art. 309 of the Constitution for the simple reason that the provisions of the General Clauses Act as such apply only to the interpretation of an Act passed by the Legislature or a Regulation.

It has, however, to be seen whether the principle underlying s. 16 of the General Clauses Act can be applied to the interpretation of the Lekhpals Service Rules, 1958, framed under Art. 309 of the Constitution. It can so apply if the provisions contained in s. 16 of the General Clauses Act embody a rule of general interpretation [vide *National Sewing Thread Co. Ltd.* v *James Chadwick & Bros. Ltd.* (1) and *Harish Chandra* v *State of Madhya Pradesh* (2)].

In our opinion s. 16 of the General Clauses Act embodies a rule of general interpretation and unless the context otherwise requires it must be held that the authority competent to appoint had also by implication been authorised to dismiss or remove the Lekhpal who was a person in civil employment of the State. A perusal of the Lekhpals Service Rules, 1958, clearly indicates that the intention must have been to confer the power of dismissal also on the Assistant Collector who was specifically authorised to appoint a Lekhpal.

In the Full Bench case of *Emperor* v *Maung Bo Maung* (3) where the power to appoint assistant accountants in treasury had been transferred by the State Government to Deputy Commissioners by means of a circular letter containing rules it was held that—

> (1) The Deputy Commissioner was not acting on behalf of the State Government while making

(1) A.I.R. 1953 S.C. 357 (2) A.I.R. 1956 S.C. 90
(3) A.I.R. 1935 Rangoon 303

the appointment and he himself was the authority constituted to do so, and

(2) although the rules did not confer on the Deputy Commissioner the power to dismiss treasury assistant accountants also that power also stood transferred to him by implication

We are in respectful agreement with the view expressed in the Rangoon case

Under s 197, Cr P C the sanction of the Governor is necessary where

(1) the accused is a public servant who is not removable from his office save by or with the sanction of the State Government or some higher authority

and

(2) he is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty

In the present case the second condition is satisfied, but the first condition is not satisfied and, therefore, no sanction of the Governor was necessary before launching the prosecution against the applicant.

Now that the two criminal revisions have also been referred to us for disposal we proceed to consider each of them separately on merits

CRIMINAL REVISION NO 1623 OF 1961

It has been held by the courts below that plot no 769 of village Khatawan in district Varanasi, had continued to remain in possession of Rampat (complainant) during the years 1367 and 1368 F, that Rampat had become its bhumidhar in the year 1949 and that his brother Sheojog had nothing to do with the said plot

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and was not in possession of it during the years 1367 and 1368 F but the Lekhpal had wrongly shown Sheojog to be in possession thereof during those years It was also held that the aforesaid wrong entries facilitated Chandrabhushan, son of Sheojog, to file copies of those documents in a criminal case in support of the prosecution case

The defence of the present applicant was that it was during the course of *partal* that he had came to know that Sheojog was in possession over the disputed plot during the years 1367 and 1368 F and for that reason he had made those entries in the Khasra in the due discharge of his duties

Chandrabhushan was also prosecuted but was acquitted as the prosecution could not establish its case against him beyond reasonable doubt The applicant who was the Lekhpal was, however convicted and sentenced because the evidence led in the case revealed that Rampat and not Sheojog was in possession of the disputed plot during the relevant years It was also held that the Lekhpal had neither prepared a list in Form PA 10 nor sent its copy to the village Sabhapati nor did he issue its extracts to the complainant It was further held that he had failed to comply with the provisions of paras A 80 and A 81 of the Land Records Manual

It was on the basis of the above findings that it was held by the court that the charge under s 218 I P C was made out against the applicant There was no direct evidence in support of the prosecution case to prove that the applicant acted dishonestly

The main question to be considered by the courts below was whether the applicant had acted dishonestly There is nothing on the record to show that the applicant, who was the Lekhpal did not make any

partal In case it had been represented to the Lekh pal (applicant) at the time of the *partal* that Sheojog and not his brother, was in actual physical possession of the disputed plot during the years 1367 and 1368 F and he had made the entries in the Khasra on the basis of that *partal* it could not be inferred from his act in making those entries that he had acted dishonestly in order to cause wrongful gain to one party and wrong ful loss to the other The Lekhpal was not required to make a very detailed enquiry on the point of posses sion There was already dispute between the two brothers regarding the possession of the said plot and so it could have been represented to him at the time of the *partal* that during the years in question Sheojog and not Rampat, had been in possession of the disputed plot A very heavy burden therefore lay on the prose cution to establish that the Lekhpal had acted dishonest ly when he made the impugned entries in the Khasra for 1367 and 1368 F In our opinion the circumstantial evidence available in the case does not satisfactorily dis charge that burden

The facts that the statement in Form PA 10 was not prepared that the provisions of paras A 80 and A 81 of the Land Records Manual were not complied with, that copies of Form PA 10 were not sent to the village Sabhapati and its extracts were not sent to the comp lainant can well establish the negligence of the Lekh pal, but it is difficult to draw from such acts the in ference that he also acted dishonestly Strong suspi cion might arise against the Lekhpal (applicant) But suspicion, howsoever strong cannot take the place of legal proof

In our opinion the circumstances relied upon by the prosecution do not lead to one and the only con clusion in the case that is that the applicant had act

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of dishonestly with the intention of causing wrongful gain to one party and wrongful loss to the other.

In our opinion the applicant is entitled to the benefit of doubt and acquittal.

CRIMINAL REVISION NO. 50 OF 1965

The courts below have on good evidence arrived at the following conclusion. The applicant was the *lamberdar* of village Sanehua district Ghazipur, in the Fasli year 1370. Prior to the abolition of zamindari Thegun and Ganesh were the tenants of plots nos. 2378, 2380 and 2381 situate in that village. They had however been dispossessed by the zamindars namely Bechan Rai (complainant) and others some time in the year 1355 F. and the zamindars had continued to remain in possession of those plots till after the year 1370 F. The tenants had filed an application in the court of the Sub Divisional Magistrate on September 29, 1961 alleging that they were in actual possession of the aforesaid plots. A mutation case was started on the basis of that application and the Kanungo who was required to submit a report did not support the case of Thegun and Ganesh. Two years later i.e. on June 16, 1963 the tenants presented an application for withdrawal of the mutation case on the ground that their names had already been entered in the Khasra against the plots in dispute. Bachan Rai had obtained a copy of the Khasra entry for 1370 F. from the Lekhpal on February 1, 1963 and it did not support the case of the tenants. He again obtained a copy of the same document on June 17, 1963 and found that the words *sirf kharif* had been added sometime after February 17, 1963 to show that the zamindars were not in possession of the plots after Kharif 1370 F. and that the Lekhpal claimed to have made the *partal* on February 1, 1963.

The courts below also arrived at the finding that it was not satisfactorily established that any *partal* had been made by the Lekhpal on February 1, 1963 There is no reliable evidence in support of this finding which is based on surmises only The burden of proof lay heavily on the prosecution to establish that the official act of *partal* about which a mention was made in the diary of the Lekhpal and the entry had been witnessed by two witnesses had not been performed The defence had led oral evidence to show that the *partal* had in fact been made on February 1 1963 The courts below did not consider that evidence to be reliable mainly on the ground that the witnesses who signed the entry regarding the *partal* had not been examined by the defence The Lekhpal was expected to make a *partal* and in our opinion after some evidence had been led in support of the *partal* having been made a heavy burden lay on the prosecution to prove that the *partal* had in fact not been made The witnesses who had attested the *partal* entry should therefore have been called by the prosecution and not by the defence to establish one of the following facts

(*a*) Either they had not in fact signed the *partal* entry

or

(*b*) they had reasons to falsely attest the *partal* entry although the *partal* had not in fact been made

The courts below have misguided themselves by laying undue emphasis on the fact as to which party was in actual possession of the disputed plots in Rabi 1370 F The main point to be considered was whether circumstances existed in which the Lekhpal could at the time of the *partal* be made to believe that the tenants and not the zamindars were in possession of

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the disputed plots in Rabi 1370 F There was dispute between the tenants and the zamindars regarding the possession of those plots In the circumstances the probability that at the time of the *partal*, it was represented to the Lekhpal that the tenants were in possession of those plots in Rabi 1370 F cannot be excluded The tenants produced a good deal of oral and documentary evidence in support of their case on the point of possession That evidence cannot be considered to be satisfactory in comparison with the evidence led by the complainant on the point How ever the fact remains that the Lekhpal who was not expected to examine the entire evidence of both the parties on the question of possession at the time of making the *partal*, could well have been misinformed

The mere fact that no entry of the words *sufkhauf* was made in the copy issued on February 17 1963 can be no proof of the fact that till that date the Lekhpal had not made the *partal* It appears from the evidence on the record that the Lekhpal was in the habit of making belated entries in the Khasra The probabilities could not therefore, be ruled out that on the basis of the *partal* dated February 1, 1963 the Lekhpal made entries in the Khasra sometime after February 17 1963 That may account for the difference between the two copies both issued by the same Lekhpal one on February 17 1963 and the other on June 17, 1963

Again the facts that the Lekhpal (applicant) did not prepare statements in Form PA 10 and made an entry which was not quite in conformity with the provisions of the Land Records Manual might raise some suspicion against the applicant But suspicion however strong cannot take the place of legal proof Negligence in the performance of duty cannot be construed to be due to dishonest motive only

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There is no direct evidence in support of the prosecution case. The circumstantial evidence is wholly insufficient to bring home the charge under s. 218 I. P. C. to the applicant, who is entitled to benefit of doubt and acquittal.

Both the revision applications are allowed and the conviction and sentence of the applicants under s. 218 I. P. C. are set aside. They are on bail, and need not surrender. Their bail bonds are discharged. The fine, if already paid, shall be refunded to them.

Revision applications allowed.

CRIMINAL REFERENCE

Before Mr Justice S D Khare and Mr Justice Yasoda nandan

SUBHWANTI — APPLICANT

v

STATE — OPPOSITE PARTY

1967
April 19

Code of Criminal Procedure, *(Act V of)* 1898 *ss* 488 438 *and* 439—*Order in proceedings for maintenance—Whether subject to revisional power of the High Court*

An order in proceedings for maintenance under s 488 of the Code of Criminal Procedure is subject to the revisional power of the High Court under s 439 of the Code The doubt on the point has now been set at rest by the amendment in s 438 made by Act No 39 of 1956

Criminal Reference No 157 of 1965 against the order of Om Prakash Mehrotra Temporary Civil and Sessions Judge Varanasi, on 2nd March 1965 in Criminal Revision No 11 of 1965

C S Saran for the Applicant

J N Tewari and *M K Shukla,* for the Opposite party

The following judgment of the Court was delivered by—

S D KHARE, J —This is a reference made by the Temporary Sessions Judge Varanasi recommending that the order passed by the Magistrate on January 4 1965 dismissing an application under s 488 Cr P C be set aside and the case be sent back to the Magistrate for disposal in accordance with law A learned single Judge of this Court while admitting the reference expressed the view that it was not at all clear whether the revisional jurisdiction of the High Court under s 439,

Cr. P. C. could be exercised to correct an error in the order passed under s. 488 Cr. P. C. However, inas much as such a revision application had been entertained in the case of *Shamsher Khan* v. *Sm. Siddiqunnisa* (1) he admitted the reference but directed that the papers be laid before the Hon'ble the Chief Justice for getting the matter decided by a Division Bench of this Court. That is how the case has come before us.

The undisputed facts of the case leading to this reference briefly stated are that Sm. Shubhwanti applicant was the legally wedded wife of Dhanni Ram opposite party. About twelve years before the date of the application under s. 488 Cr. P. C. a daughter was born to the applicant and she was alive on the date of the application. The applicant claimed a monthly allowance of Rs. 50 for herself and her minor daughter. The plea taken up by Dhanni Ram opposite party was that about twelve years prior to the date of the application and soon after the daughter was born the Panches with the consent of both the parties had effected a divorce between them and as such customary divorce was recognised in their community they had nothing to do with each other from the date of the divorce and had been keeping separate from each other with mutual consent. The applicant had filed two documents to wit (1) certified copy of the *kutumb* register for the year 1960 to show that she and her daughter had been living with her husband in the same house till the year 1960 and (2) certified copy of the complaint dated 5th August 1964 filed by one Ram Briksh against Dhanni opposite party under s. 494/498 I. P. C. in respect of Sm. Muneshwari whom the opposite party claimed to have married 12 years ago immediately after having divorced the applicant. The purpose of filing these

(1) A. I. R. 1958 All. 720

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documents obviously was that the case taken up by the opposite party was not true. The Magistrate, while considering the effect of the entries made in the *kutumb* register observed that the same indicated that Smt. Shubwanti lived in the house of Dhanni Ram the opposite party with her daughter. However, he did not consider the effect of that finding during the course of the order which he passed at the time of rejecting the application of Shubwanti and her daughter for maintenance allowance under s. 488 Cr. P. C. He also did not consider the effect of another document filed by the applicant, that is to say, the copy of the complaint referred to above.

In view of what has been stated above, the learned Additional Sessions Judge has observed that there are two serious infirmities in the order passed by the Magistrate. The first infirmity is that he did not consider the question of the right of the daughter of the applicant to get any maintenance allowance. Even if the wife was divorced according to the custom prevalent in the society, the right of the daughter to get maintenance allowance was not negatived by the order passed by the Magistrate. However, no maintenance allowance was allowed to her. The second infirmity pointed out was that the Magistrate has failed to consider the effect of the two documents to wit the copy of the *kutumb* register for the year 1960 and the certified copy of the complaint under s. 494/498 I. P. C. made on 5th August 1964. The effect of these documents could be to demolish the merits of the case of the opposite party.

The grounds for accepting the revision as mentioned in the reference order are therefore fairly good and strong. The only question that has to be considered is whether the High Court can exercise its revisional

powers under s 439 Cr P C in respect of an order passed under s 488 Cr P C

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Subs (1) of s 438 and subs (1) of s 439 Cr P C read as follows

438(1) The Sessions Judge or District Magistrate may if he thinks fit, on examining under s 435 or otherwise the record of any proceeding report for the orders of the High Court the result of such examination and when such report contains a recommendation that a sentence or an order be reversed or altered may order that the execution of such sentence or order be suspended and if the accused is in confinement that he be released on bail or on his own bond

439(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge the High Court may in its discretion exercise any of the powers conferred on a Court of appeal by ss 423 426 427 and 428 or on a Court by s 338, and may enhance the sentence and when the Judges composing the Court of revision are equally divided in opinion the case shall be disposed of in the manner provided by s 429

The words or an order and or order occurring in s 438(1) Cr P C were incorporated by the Amending Act 39 of 1956 Prior to the Amending Act 39 of 1956 there could have been some doubt whether or not an order under s 488 Cr P C can be revised or can be interfered with by the High Court in its revisional powers under s 439 Cr P C However after the addition of the word order in sub s (1) of s 438 Cr P C that doubt has been set at rest It is now clear that after the Amending Act 39 of 1956 an order passed under s

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488 Cr P C can be questioned in revision before the High Court in the exercise of its revisional powers under s 439 Cr P C

It is unnecessary to refer to the case law prior to the year 1956 All the cases decided after the year 1956 are consistent on the point that the revisional power under s 439 Cr P C can be exercised by the High Court in the case of an application under s 488 Cr P C All that has been said is that such power should be rarely exercised It has been held that the High Court would interfere when the lower court has not exercised its discretion judicially, vide *Bhaskaran* v *Kunhipennu* (1) and *Wudali Gangamma* v *Wudali Subbarayudu* (2) It was held in the case of *Tejabai* v *Shankernao* (3) that so long as the proceedings of the Magistrate are in order and so long as he has estimated the evidence his decision should not be disturbed even if the revisional Court could have come to another conclusion on the evidence

These are however matters which concern the extent to which and the proper cases in which the revisional powers should be exercised There is no difference of opinion whatsoever on the point that the revisional jurisdiction under s 439 Cr P C can be exercised by the High Court against an order passed in proceedings under s 488 Cr P C

In the result we accept the reference and direct that the order of the Magistrate dated January 4 1965 be set aside and the case be sent back for disposal in accordance with law

Before parting with this case we might mention that an affidavit was filed today on behalf of the opposite party to indicate that the daughter of the applicant has

(1) A I R 1960 Kerala 110 (2) A I R 1961 A P 210
(3) A I R 1966 Bom 48

been married in the year 1965 The learned counsel for the applicant says that he has not been able to verify whether the facts contained in the affidavit are true or false This matter can be raised by both the parties in the court of the Magistrate

Reference accepted

APPELLATE CIVIL (F B)

Before Mr Justice Oak, Mr Justice Dwivedi and Mr Justice Gangeshwar Prasad

KUNJ BEHARI LAL DECEASED — APPELLANT,

v.

SAGUN CHAND AND OTHERS — RESPONDENTS

U P Court Fees Act, 1870—*ss 6B 7(iv A) 12 and 28 Sch II Art 17(iii)—Sale deed if an instrument securing property under s 7(iv A)—Suit seeking a declaration that a sale deed was unauthorised void illegal and ineffective if involves adjudging void or voidable as contemplated in s 7(iv A)—Applicability of s 7(iv A) to such suits—Finality under s 12 if relates only to valuation alone or also covers the question of court fee—Omission of a revision under s 6B—Effect—Whether appellate court can demand deficiency on plaint—If so the effect of failure to comply*

The expression securing in s 7(iv A) connotes making safe or certain and has the same connotation in relation to all things mentioned in the section and consequently bears a similar connotation in relation to other property having such value Therefore a sale deed is an instrument securing property within the meaning of s 7(iv A) of the Act A suit seeking a relief for declaration that a sale deed was unauthorised void illegal and ineffective involves adjudging void or voidable the sale deed as contemplated by s 7(iv A) and therefore such a suit falls squarely within the section and as such the provisions of Art 17(iii) of Sch II of the Act would not be attracted

The finality declared by s 12 of the Act is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls Therefore the finality would not attach to a decision or order on the question of court fees Nor such a finality would arise because of the omission by the Chief Inspector of Stamps to file a revision under s 6B of the Act against the decision or order

Where the court fees paid on the plaint was insufficient the plaint would be invalid and therefore the appellate court has to determine the validity of the plaint and where the appellate court finds that there was a deficiency it has power under s 28 of the Act to direct the payment of the deficient court fee

Chief Inspector of Stamps v *Jaspal Singh* (1) dissented from

Nemi Chand v *The Eduard Mills Co Ltd* (2) followed

Case law discussed

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KUNJ BEHARI LAL v NEMI CHAND

First Appeal No 301 of 1959 connected with First Appeal No 302 of 1959 against the decree of Ram Behari Lal Civil Judge, Farrukhabad in Suit No 3 of 1957 decided on 30th November 1957

K C Saxena and *S C*, for the Appellants

Radha Krishna, for the Respondent

GANGESHWAR PRASAD J —The matters which have been referred to this Full Bench relate to court fee

Sagun Chandra and Smt Rajeshwar Devi plaintiffs respondents in First Appeal no 301 of 1959 filed suit no 3 of 1957 in the court of the Civil Judge, Farrukhabad for a declaration that a sale deed dated 16th October 1952 was unauthorised void illegal and meffective against the plaintiffs and it did not bind them or affect their one third share in the property purporting to have been sold under it Smt Ram Piari plaintiff respondent in First Appeal no 302 of 1959 filed in the same court Suit no 48 of 1956 for a similar declaration in her own favour in respect of the same sale deed A court fee of Rs 18 12 0 as a fixed court fee for a suit to obtain a declaratory decree, was paid on the plaint in both the suits The Inspector of Stamps raised an objection that additional court fee was payable on the plaint in the two suits as the reliefs claimed therein were covered by s 7 (iv A) (U P) of the Court Fees Act Kunj Behari Lal

(1) A I R 1956 All 169 (2) A I R 1958 S C 2

1967 who is the vendee under the sale deed and who was the main contesting defendant in the suits also took an objection that the court fee paid on the plaints was insufficient The learned Civil Judge framed an issue on the question of court fee and gave a finding thereon on 6th September 1957 He held that s 7(iv A) (U P) of the Court Fees Act has no application as a sale deed is not an instrument securing property and that the suits fall under Art 17(iii) of Sch II of the Court Fees Act His finding accordingly was that the court fee paid on the plaint in the two suits was sufficient On the same date the learned Judge passed an order that for the reasons given in the finding recorded by him the report of the Inspector of Stamps was not correct and directed that information of the order be given to him No application for revision of this order was filed under s 6 B of the Court Fees Act Both the suits were decreed Kunj Behari Lal thereupon filed these appeals paying the same court fee on the memorandum of appeal as had been paid on the plaint After examining the record the Stamp Reporter of this Court reported that the suits giving rise to these appeals really fall within the purview of cl (2) of s 7(iv A) (U P) of the Court Fees Act and there was, accordingly a deficiency of Rs 161 12 0 in the court fee on the plaint and a similar deficiency on the memorandum of appeal in each of the two cases There was an objection to the report and the matters eventually came up before a learned Judge of this Court The learned Judge found that there was a conflict of authorities on the questions involved and ordered that the papers be laid before Hon'ble the Chief Justice for constituting a larger Bench for deciding them The matter went before a Division Bench but the Bench thought that the questions should be decided by a Full Bench That is how they have been referred to this Bench

The questions that arise for consideration may be formulated thus

(1) Whether the suits giving rise to these appeals fall under s 7(iv A) (U P) or under Art 17(iii) of Sch II of the Court Fees Act?

(2) Whether the decision or order of the Civil Judge dated 6th September 1957 relating to the court fee payable in the suits has become final?

(3) Whether an order directing the plaintiffs respondents to make good the deficiency in court fee on the plaint in the two suits can be made by this Court in the appeals arising out of them and what would be the result if the deficiency is not made good?

Question 1—S 7(iv A) applies to suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value or an instrument securing money or other property having such value A sale-deed cannot appropriately be described as an instrument securing money Money is certainly paid or promised in exchange for transfer of ownership effected by a sale deed, but securing money is not the object of a sale deed and it does not constitute its essence What has to be seen therefore is whether a sale deed is an instrument securing 'other property having such value' The Civil Judge relying on *Chief Inspector of Stamps* v *Jashpal Singh* (1) held that a sale deed is not an instrument securing property In that case a learned single Judge of this Court has observed

> The expression an instrument securing money obviously means a document creating a charge or hypothecation bond or a mortgage deed or any other document intended to assure payment of money

(1) A I R 1958 All 168.

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The expression an instrument securing other property should have unless the context does not permit it, a similar meaning A deed of sale hardly secures property It conveys the property and transfers the title of the property to the transferee

Apart from what has been quoted above nothing else has been said by the learned Judge in support of the view taken by him There is also no reference to the authorities bearing on the point Indeed it has been noted in the judgment that the learned counsel for the State was not able to cite any authority to support the contention that a sale deed was a document securing property within the meaning of s 7(iv A) It would appear that there were weighty authorities in support of the contention

In *Ram Kumar* v *Damodar Das* (1) a Division Bench of this Court had to determine the court fee payable by the plaintiffs appellants in a suit filed by them against their father for partition of certain joint family properties The properties included two items which had already been sold by the father to certain persons and the vendees were also parties to the suit It was said in the plaint that the two items sold to the vendees were worth Rs 1 50 000 but the father of the plaintiffs appellants had sold them for Rs 82 000 only that the sale deeds were not executed for legal necessity and that they were not binding on the plaintiffs appellants The trial court had treated the plaint as involving cancellation of the sale deeds and demanded court fee on one fifth of the valuation of the subject matter The Bench upheld the order of the trial court and observed

'We are therefore of opinion that as this case relates to sale deeds we have to look to the value of

(1) A I R 1949 All 839

the property in respect of which the sales were effected That value according to the plaintiffs appellants themselves was Rs 1 50 000 at least at the time of the sale deeds The lower court was, therefore right in demanding court fee on the sum of Rs 80 000 that is on one fifth of the total value which was Rs 1 50 000

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The Bench referred in support of its view to *Jonnava Rami Balireddi* v. *Khatipulal Sab* (1) and *Kolachala Kutumba Sastri* v. *Lakkaraju Bala Tripura Sundaramma* (2) in both of which the Madras High Court had to deal with a somewhat similar provision introduced into the Court Fees Act by a Madras Act In the latter case the point whether a sale deed is an instrument securing property does not appear to have been disputed but the Full Bench which decided the case accepted the view taken in the former case where the point was specifically raised and considered The learned Judge who decided the former case held that a mortgage deed is a document securing money and a sale deed is a document securing other property, and referred to the observations made by him in an earlier decision *Doria Swami* v. *Rangavelu* (3) These observations may well be quoted here

> The words securing money or other property are not happy but the question is Is this or not a suit for cancellation of a document securing property having money value I think it clearly is I have no doubt that the release deed in question is a document securing property in other words by that document the property covered by it is made secure to the defendants Can there be any doubt that a sale deed comes within the terms of this section? The present instrument does not materially differ

(1) A I R [illegible] Mad (2) A I R 1930 Mad 540 (F B)
(3) A I R 1929 Mad [illegible]

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Gangeshwar Prasad J.

from a sale deed By that the rights of the plaintiffs in the partnership and its property have been transferred for consideration to the defendants The word 'secure' may mean according to the Oxford Dictionary to make the tenure of a property secure to a person I am therefore of the opinion that the proper section applicable is s 7(iv A)

In *Sm Kamala Devi* v *Sunni Central Board of Waqfs, U P, Lucknow* (1) the question whether a *waqfnama* is an instrument securing property came up for decision before a Division Bench of this Court The learned Judges constituting the Bench were not agreed in one particular which is not relevant for the purpose of the present case but they agreed in holding that a *waqfnama* which operates as an extinguishment of the right of the executant in a property and conveys it to the donee is an instrument securing property within the meaning of s 7(iv A)

None of the above-mentioned cases was however brought to the notice of the court in *Chief Inspector of Stamps* v *Jashpal Singh* (2) In a subsequently decided case also a Division Bench of this Court dealt with the meaning of the expression securing property The question in that case was whether a will is, after the death of the testator an instrument securing property within the meaning of s 7(iv A) The Bench held that it was such an instrument and observed

> The verb to secure has a wide meaning and we think that the definition most appropriate in the present context is to make secure or certain (Murray) or to make safe (Oxford) *Udai Pratap Gir* v *Shanta Devi* (3)

Except for *Chief Inspector of Stamps* v *Jashpal Singh* (2) I do not find any case in which it has been

(1) A I R 1949 All 68 (2) A I R 1956 All 165
(3) A I R 1956 All 492

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Gangeshwar Prasad J.

held that a sale deed is not an instrument securing property and, as I have shown above, the view taken in that case is contrary to three Division Bench decisions of this Court It is true that in only one of these three decisions the instrument involved was a sale deed and out of the remaining two one dealt with a *waqfnama* and the other with a will But that does not affect the value of the latter two decisions in the determination of the question whether a sale deed is an instrument securing property because to my mind, all that may be said for treating a *waqfnama* or a will as an instrument securing property may be said with equal if not greater force for treating a sale deed as such

It appears to be clear that the expression securing in s 7(iv A) of the Court Fees Act connotes making safe or certain Surely the expression must have the same connotation in relation to all the things spoken of in the section and if it is the above connotation that has to be ascribed to it in relation to money it must bear a similar connotation in relation also to other property having such value Further, the words other property having such value obviously cover immovable property as well and the explanation appended to the section puts that beyond doubt The only sense in which an instrument may be regarded as securing immovable property is that it makes the title thereto or its possession and enjoyment safe or certain Even according to the learned Judge who decided the case of *Chief Inspector of Stamps v Jashpal Singh* (1) an instrument securing money obviously means a document intended to assure payment of money and the expression an instrument securing other property should have unless the context does not permit it a similar meaning He, however did not regard a sale deed as an instrument

(1) AIR 1966 All 105

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securing property because it conveys property and transfers the title of the property to the transferee I may with great respect to the learned Judge say that what has been regarded by him as taking away from a sale-deed the character of an instrument securing property seems to me as imparting to it that character in the highest degree A sale deed assures in the most effective manner the divesting of the title of the transferor in a property and the vesting of that title in the transferee and where the sale of a property can take place only by means of a deed it is the sale deed alone that assures the extinction of the transferor's interest and the acquisition of that interest by the transferee In my opinion therefore a sale deed is an instrument securing property within the meaning of s 7(iv A) of the Court Fees Act

The next thing to be seen is whether the suits fall within any of the categories mentioned in the first portion of s 7(iv A) In what circumstances a suit has to be regarded as one for cancellation of an instrument and in what others as one for merely obtaining a declaration decree has been a matter on which there has been considerable divergence of views in the decided cases The divergence has however lost its significance in the State of U P in view of s 7(iv A) introduced into the Court Fees Act by U P Act XIX of 1938 The section has a very wide compass It covers not merely suits for cancellation of instruments described therein but also for adjudging them void or voidable and it goes further and embraces not only suits for cancellation of such instruments or adjudging them void or voidable but also suits involving such cancellation or adjudging On the scope of the first portion of the section, therefore it is not necessary to refer to authorities I may however, mention a Division Bench case of this Court *Mst. Jileba*

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(Tek Chand J)

s *Parmeshara* (1) where it was held that s 7(iv A) has been so worded that even though the plaintiff has not claimed the relief of cancelling or adjudging void or voidable an instrument if the suit involves such cancellation or adjudging void or voidable such instrument, court fee under s 7(iv A) is payable

In regard to this aspect of the question the learned Judge before whom these matters initially came up for decision referred to *Kishan Lal* v *A S Higher Secondary School, Jaunpur* (2) and observed that he was unable to reconcile that decision with *Ram Kumar* v *Damodar Das* (3) To my mind I see no with great respect there is no conflict between the two decisions I have already stated the nature of the suit in which the latter decision dealt and there can be no doubt for a moment that the suit involved adjudging void or voidable the two sale deeds executed in favour of the vendees who were parties to the suit The learned judge observed in the present that the sale deeds were not executed for legal necessity and were not binding on them and they apparently prayed for a partition of their share in the properties which had been sold two In these circumstances s 7(iv A) obviously applied In *Kishan Lal* v *A S Higher Secondary School Jaunpur* (2) the suit was for a declaration that a sale deed and a waqf deed executed by a Hindu widow were not binding on the plaintiff on her death as the alienations were without legal necessity and not for the benefit of the estate *Ad valorem* court fee under s 7(iv A) was paid on one fifth of the value of the property covered by the two deeds So far as these deeds went there was no dispute as to the sufficiency of the court fee The defendants contested the suit *inter alia*, on the ground that the lady was not a limited owner but an absolute owner having inherited

(1) A I R 1939 All 511 (2) A I R 1939 All [illegible]
(3) A I R 1939 All [illegible]

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(Shah, J.)

the property from her husband under a will. The plaintiff in his plaint, had made no reference whatsoever to the will and had completely ignored it. After the filing of the written statement by the defendants, however the plaintiff denied the genuineness of the will alleging that it was a forgery but he took no other plea in respect of it. The suit was dismissed by the trial court and the plaintiff then filed a first appeal in this Court. The Chief Inspector of Stamps reported that since the appellant in effect wanted cancellation of the will on its being adjudged to be void or voidable in addition to the relief of adjudging the deeds of sale and *agaj* void or voidable he should have paid additional court fee for being relieved from the will in respect of the property involved in the suit. The Division Bench rejected the report and held that no additional court fee was required. I have already noted that not only was there a total absence of any relief in respect of the will but there was also no reference to it in the plaint. The stand taken by the plaintiff in reply to the defence based upon the will could not be taken into account in determining the court fee payable for the suit but in his reply too he did not say that the will was void or voidable and repudiated the very existence of the will by describing it as a forgery. The nature of the suit in that case was therefore essentially different from that of the suit in *Ram Kumar* v. *Damodar Das* (1) and it cannot be said that the decision in the former case is in any manner opposed to the decision in the latter.

The reliefs claimed in the suits which have led up to these appeals make it clear that the suits are for adjudging the sale deed void or voidable. It is true that the relief claimed in Suit no. 48 of 1956 unlike the relief claimed in Suit no. 8 of 1957 does not mention the

(1) A.I.R. 1949 All. 93.

word void or voidable in connection with the declaration sought But the absence of the word void or voidable in the relief is a matter of not much consequence in deciding whether a suit is for adjudging a deed void or voidable or involves such adjudging In Suit no 48 of 1956 also the plaintiff has prayed for a declaration that the sale deed is illegal without authority and not binding on the plaintiff or her one third share Evidently that suit too like Suit no 3 of 1957 is for adjudging the sale deed void or voidable Both the suits therefore fall squarely within the four corners of s 7 (iv A) and Art 17(iii) of Sch II which applies only to suits not otherwise provided for does not come into play

Question 2—The only provisions in the Court Fees Act which confer finality on decisions on matters affecting the court fee payable on a document are s 5 and s 12 S 5 can have no application to the decision or order of the Civil Judge and it has therefore to be left out of consideration S 12 runs as follows

> (i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum as the case may be is filed and such decision shall be final as between the parties to the suit
>
> (ii) But whenever any such suit comes before a court of appeal reference or revision if such Court considers that the said question has been wrongly decided to the detriment of the revenue it shall require the party by whom such fee has been paid to pay within such time as may be fixed by it so much additional fee as would have been payable had the question been rightly decided If such additional

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fee is not paid within the time fixed and the default is of the appellant the appeal shall be dismissed but if the defaulter is the respondent, the Court shall inform the Collector who shall recover the deficiency as if it were an arrear of land revenue

It would be seen that this section is in its application confined to such decisions only as are given on a question relating to valuation for determining the court fee A decision on the question whether a suit falls under s 7(iv A) or Art 17(iii) of Sch II is not a decision on a question relating to valuation for determining the court fee payable in respect of it but on a question relating to the basis or mode of the computation of court fee To what kind of decision s 12 attaches its finality has been considered by the Supreme Court in *Nemi Chand* v *The Edward Mills Co Ltd* (1) where after referring to the decisions relating to the matter the Supreme Court has given its approval to those decisions in which it has been held that the finality declared by s 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls This decision of the Supreme Court settles finally the scope of s 12 I may however mention two subsequent Division Bench cases of this Court *L Chunni Lal* v *L Gur Dial Prasad* (2) and *Ram Katon* v *Chaman Lal* (3) decided in accordance with the view which received the approval of the Supreme Court so far as s 12 was concerned The result therefore is that neither of the two ss 5 and 12 can provide any finality to the decision or order of the Civil Judge on the question relating to the court fee payable for the two suits Even if s 12 had been applicable the decision would have been final only between the parties to the suit and sub s (2) of the section would

(1) A I R 1963 S C 98
(2) 1965 A L J 864
(3) 1965 A L J 641

have not only empowered this Court to direct payment of additional court fee but made it obligatory to do so an case it considered the decision wrong

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Gangeshwar Prasad J

It is true that it was open to the Chief Inspector of Stamps to move this Court under s 6 B for revision of the order passed by the Civil Judge on the report of the Inspector of Stamps But there is nothing in the section or in the Act to indicate that if the Chief Inspector of Stamps does not move for revision under s 6 B the order in respect of which this could have been done becomes final and can no longer be questioned or disturbed The absence of any provision attaching finality to the order becomes less significant when it is contrasted with the presence in the Act of finality creating provisions in regard to certain other matters and the conclusion seems irresistible that the order does not finally decide the question of the category in which a particular suit falls and the basis or mode of computing the court fee payable in respect of it

In *Official Receiver* v *Mukund Da* (1) a Division Bench of this Court held that there is nothing in s 12(2) to indicate that if the Chief Inspector of Stamps has not taken any steps under s 6 B the matter becomes final and that it cannot be considered again by a court of appeal reference or revision under that section The Bench then proceeded to observe that no doubt the Chief Inspector of Stamps if he has failed to take any action under s 6 B would be debarred from raising the question again in a court of appeal reference or revision when the suit comes before such court at a later stage but if the Court *suo motu* or otherwise e g on the report of the Stamp Reporter finds that a question relating to the amount of court fee payable on a plaint or memorandum of appeal has been wrongly decided

(1) A I R 1949 All 594

to the detriment of the revenue there is no reason why it should not be able to consider it afresh and direct that such additional fee as may be payable on such plaint or memorandum of appeal be paid by the party from whom it is due The decision in that case was based entirely on s 12 but in the light of what has been laid down by the Supreme Court in *Nemi Chand v The Ld and Mills Co Ltd* (1) it must be said that s 12 was not applicable

Ss 4 5 and 6 of the Act however make it abundantly clear that it is for the court to which a memorandum of appeal is presented to decide whether or not the memorandum is sufficiently stamped irrespective of the fee paid on the plaint and irrespective also of any decision given or order passed by the trial court on a lower court of appeal in regard to the provision under which court fee is chargeable for the suit The fact that it was open to the Chief Inspector of Stamps to move this Court under s 6 *B* for revision of the order passed by the Civil Judge on his objection cannot change the situation Appeals having been filed in this Court it is now for this Court to decide the amount of court fee payable in respect of the suits out of which the appeals have arisen and neither the decision of the Civil Judge on the issue relating to court fee nor his order on the objection raised by the Chief Inspector of Stamps has become final

Question 8—The power of this Court to direct payment of additional court fee on the memorandum of appeal on the ground that court fee is payable on a basis different from the basis on which it was paid on the plaint does not in my opinion imply the existence of a power to demand payment of additional court fee on the plaint on the same ground In order that such a

(1) AIR 1959 SC 98

power may be exercisable it must have a clear statutory basis In *Official Receiver v Mukund Das* (1) sub-s (2) of s 12 was regarded as giving that power Sub-s (2) of that section however applies only when the question referred to in sub-s (1) has been wrongly decided and since according to the Supreme Court decision in *Nemi Chand v The Edward Mills Co Ltd* (2) sub-s (1) is limited in its application to cases where only the question of valuation pure and simple has been decided sub-s (2) cannot give the aforesaid power Really that such a power has been conferred by s 28 of the Court Fees Act The section runs as follows

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Gopal Isaac Pramod J

> No document which ought to bear stamp under this Act shall be of any validity unless and until it is properly stamped
>
> But if any such document is through mistake or inadvertence received filed or used in any Court or office without being properly stamped the presiding Judge or the head of the Office as the case may be or in the case of a High Court any Judge of such Court may if he thinks fit order that such document being stamped as he may direct and on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance

Broadly speaking ss 4 and 6 of the Act provide that no document of any of the kinds specified in the First or Second Schedule of the Act shall be filed exhibited or recorded in or shall be received or furnished by the court or the office respectively mentioned in the aforesaid sections unless the proper court fee has been paid on such document S 28 lays down that unless and until a document bears the proper court fee stamp it shall

(1) A I R 1949 All 324 (2) A I R 1953 S C 98

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Gangeshwar Prasad J.

not be of any validity The combined effect of these sections, therefore, is that a plaint which is not properly stamped cannot be filed or received and even if such a plaint is filed and received it will remain invalid unless and until it is properly stamped The validity of the plaint has to be determined even in appeal whether the suit instituted by means of such a plaint has been decreed or dismissed If the suit has been decreed the court seized of the suit in appeal is to see whether it could have been decreed and if the suit has been dismissed the court is to see whether it can be decreed in appeal In either case the validity of the plaint which is the very foundation of the suit has to be examined The fact that the plaint was held to be a valid document by the court receiving it neither precludes the court of appeal from judging its validity nor absolves it from the duty of doing so If the court of appeal finds that the plaint is invalid by reason of not being properly stamped it has to ignore the plaint altogether unless and until it is properly stamped

The second paragraph of s 28 allows the invalidity of a document to be cured and invests the court with the power of directing the person concerned to make good the deficiency in court fee which creates the invalidity According to the provisions of the paragraph the document and every proceeding taken thereon shall stand validated if the deficiency is made good The result that would follow if the direction of the court in regard to a document is not complied with is not indicated in that paragraph but the reason therefor is evident The document will remain invalid under the first paragraph of the section unless the invalidity gets removed under the second paragraph In the case of a plaint therefore, if the direction given by the Court under the second paragraph is not complied with the invalidity of the

plaint continues, and such consequences as may follow from the plaint being invalid will ensue

In *L. Chunni Lal* v. *L. Gur Dial Prasad* (1) s. 28 has also been dealt with and there is an observation to the effect that an appellate court has power under the second paragraph of s. 28 to direct that deficiency in court fee may be made good if a document is to be used in the appellate court but not otherwise. The document involved there was a written statement filed by certain defendants which required court fee because of a claim made in it. In my opinion the power of an appellate court to direct payment of court fee on a document is not dependent on whether the document is to be or is not to be used in the appeal. The second paragraph of s. 28 does not speak of future use but of use already made in the past. The power to direct payment of the deficiency in court fee arises if the document has been used or even received or filed although it is not intended to be used in appeal. Of course the power is only a curative power and the failure to pay up the deficiency would only result in the document remaining invalid. With great respect to the learned Judges who decided the above case I am unable to subscribe to the proposition that if the document is not to be used in appeal the court of appeal cannot make a direction under the second paragraph of s. 28. However in the appeals before us there can be no doubt that the invalidity of the plaints filed, received and used in the court below if not cured may destroy the very basis on which the decrees under appeal were passed and its use at the hearing of the appeal cannot be dispensed with

In *Chedi Lal* v. *Kinath Chand* (2) which is a Full Bench decision of this Court all the four learned Judges composing the Bench agreed in holding that under

(1) 1956 A.L.J. 641 (2) (1911) I.L.R. 2 All. 662 (F.B.)

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s 28 of the Court Fees Act this Court has the power to direct the deficiency in court fee on a plaint to be made good SPENCE, J who delivered a separate and detailed judgment referred to both paragraphs of s 28 and then observed

> S 28 provides that no document which ought to bear a stamp under the Act shall be of any validity, until it has been properly stamped The section deals with the case in which a document through mistake or inadvertence has been received, filed or used in any Court without being properly stamped Such a document may be returned at the outset by the presiding Judge of the Court in which it has been so received or filed or used or if the document has been received filed or used in a High Court, any Judge of that Court may if he thinks fit order that such document may be stamped as he may direct But the section does not say that the High Court Judges can interfere only when this document has actually been filed in his Court If the document has been used in the High Court and the original mistake or inadvertence which permitted its reception in a lower Court without being properly stamped, comes to light in the High Court any Judge of that Court may direct that it should be properly stamped always having regard to the fact that it must be a document chargeable under the Court Fees Act This construction appears to be quite reasonable and consistent with the concluding provision of the section and on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance '

It is true that in that case the plaintiff was the appellant but that does not make any difference in the principle

Both on the wording of s 28 and on the authority of the abovementioned Full Bench decision it must be held that this Court has the power to direct payment by the respective plaintiffs of the two suits of the deficiency in court fee on the plaints filed by them

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Gangeshwar Prasad J

In *Ram Kalori v Chaman Lal* (1) s 28 also came up for consideration and the learned Judges constituting the Bench which decided that case after referring to the section said

> The plaint in the present case has not been received filed or used in the High Court It was filed and received only in the trial Court Nor is there anything to show that a mistake or inadvertence was committed in the plaint being filed received or used even in the trial Court Here the trial Court deliberately held that the court fee paid was sufficient The second part of the section cannot therefore apply and even under that part we cannot direct that the plaint should be properly stamped

With great respect I am not able to give assent to the above observation It has to be noticed that the paragraph speaks both of mistake and inadvertence and that it does not limit either mistake or inadvertence to mistake or inadvertence of one of the parties to the suit but includes mistake or inadvertence of the court as well Even if the use or reception of an insufficiently stamped document by a court has not been due to inadvertence and the document has been used or received after deliberation the use or reception is still through mistake The court using or receiving the document may have fully applied its mind to the question relating to the court fee payable on the document and may have given a finding that the court fee paid was sufficient but if the court fee is subsequently found to have been

(1) 1963 All J 884

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Gajraj Singh, J.

a sufficient the use or reception or use of the document must be regarded as having been due to mistake

Reference in this connection must be made to a decision of this Court by a Full Bench of five learned Judges in *Hari Ram v. Akbar Husain* (1). The case involved a number of questions which were bound up with the interpretation of s. 28 of the Court Fees Act. Most of those questions were only of academic interest now because they were connected with some provisions in other enactments also which have since been replaced by enactments having different provisions. There are however in that case some observations of great authority and value by KNOX, A.C.J. on s. 28 and the meaning of the word mistake therein. But the observations of the learned Judge are to be read in the context of certain important features of the case. Firstly the deficience in court fee was connected only with an incorrect valuation of the subject matter of the suit and not with the category in which the suit fell and was chargeable under the Court Fees Act. Secondly the argument on behalf of the defendant who was the appellant before the Court was not the plaintiff who had been allowed the benefit of the second paragraph of s. 28 by the lower appellate court was not entitled to the benefit because the insufficience in court fee was due to his own mistake or inadvertence and the paragraph applies only in cases of mistake or inadvertence of the court. Thirdly it was contended on behalf of the defendant that if there was nothing in the plaint to put the court or the Munsarim of the court on its or his guard there was no mistake or inadvertence so far as the court or the Munsarim was concerned. The argument that the second paragraph of s. 28 applies only in cases of mistake or inadvertence of the court was not accepted and

(1) I.L.R. (1965)

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it was held that the paragraph is subject to no such limitation. As to the contention noted above as constituting the third important feature of the case KNOX, A.C.J. observed:

> I was at first impressed by the contention that if there be nothing in the plaint to put the Court or the Munsarim of the Court on its or his guard there can be no mistake or inadvertence so far as the Court or Munsarim is concerned. But what is a mistake? It is not mere forgetfulness; it is a slip made not by design but by misadvertence. ESHER, M.R. in *Barrow v. Isaac* (1) RUSSELL, C.J. in *Stampford v. Beal* (2) and mistake or inadvertence as interpreted in *Dodd Bleeth v. Phillips* (3).

Gangeshwar Prasad, J.

The observation would have come however to be in reception at the time of drawing down, but the reception of a plaint as the result of an incorrect finding given by a court after deliberation is not a reception through mistake. I am to be [illegible] that the object of s. 28 was enacted primarily for relieving the hardship which might result on account of the first paragraph of the section and not in the interest of revenue. It is not an independent provision but a provision connected with the preceding provision in the first paragraph as the word But at its beginning would show. If the reception of a plaint as a result of a deliberate finding or order on the question of court fee is not a reception through mistake the result would be that the benefit of the second paragraph of s. 28 would not be available in such a case and even if the deficiency in court fee is made good the proceedings taken on the basis of the plaint prior to the payment of the deficiency would not be validated. The Legislature could not have intended such an inequitable result. Where a court has by a

(1) (1891) 1 Q.B. 417 (2) (1892) 1 Q.B. 74

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Gange Nath Pra Sri J

deliberate finding or order held that the plaint has been sufficiently stamped and has proceeded with the suit on that basis there is all the more reason for the extension of the benefit of the said provision It would therefore be incorrect to regard the above observation of KNOX, A C J as lending support to the view that if a court receiving a plaint has recorded a finding and an express order to the effect that the plaint is sufficiently stamped there is no reception through mistake On the words of the section itself mistake stands distinguished from inadvertence

In my opinion therefore both the first and the second paragraphs of s 28 are applicable in the present case Under the second paragraph of the section this Court may if it thinks fit direct that the deficiency in the court fee on the plaint be made good The result of a non compliance with that direction would be that the plaint would remain invalid

As a result of my answers to the questions formulated above my conclusions in regard to the position relating to court fee in these appeals are The decision of the Civil Judge on the issue relating to court fee has not become final Likewise the order passed by the Civil Judge on the objection of the Inspector of Stamps as to insufficiency of the court fee on the plaint has not become final in spite of the fact that no application for revision under s 6 B of the Court Fees Act was made The suits fall under s 7(iv A) and not under Art 17(iii) of Sch II of the Court Fees Act and court fee ought to have been paid both on the memorandum of appeal and the plaint on that basis If on a computation of court fee made on that basis it is found in either of these appeals that the plaint is insufficiently stamped such plaint has to be treated as invalid unless and until it is properly stamped But this Court may if it thinks fit

direct the plaintiff or the plaintiffs to make good the deficiency in court fee on the plaint and upon the deficiency being made good the plaint and every proceeding relative thereto would become as valid as if the plaint had been properly stamped in the first instance If the deficiency is not made good the deficiently stamped plaint will remain invalid How the invalidity of the plaint will affect the appeal or the decree under appeal is a matter to be decided by the Bench hearing the appeal

OAK J —I agree

DWIVEDI J —I concur with the conclusions

By the Court —The suits fall under s 7(iv A) and not under Art 17(iii) of Sch II of the Court Fees Act and court fee ought to have been paid both on the memorandum of appeal and the plaint on that basis If on a computation of court fee made on that basis it is found in either of these appeals that the plaint is insufficiently stamped such plaint has to be treated as invalid unless and until it is properly stamped But this Court may if it thinks fit direct the plaintiff or the plaintiffs to make good the deficiency in court fee on the plaint and upon the deficiency being made good the plaint and every proceeding relating thereto would become as valid as if the plaint had been properly stamped in the first instance If the deficiency is not made good the deficiently stamped plaint will remain invalid How the invalidity of the plaint will affect the appeal or the decree under appeal is a matter to be decided by the Bench hearing the appeal

Reference answered

APPELLATE CRIMINAL

*Before Mr Justice G D Sahgal and Mr Justice R Chandra**

1967 August 9.

THE STATE OF U P — APPELLANT

v

JAGNOO AND ANOTHER — ACCUSED RESPONDENTS

Indian Evidence Act, 1872 *s 9 —Identification parade—Idea and purpose of —*

Identification evidence—*Standard of judging—Identification of accused arrested on spot and accused arrested long after the Crime—Evidentary value of —Investigation by S O who took active part in the raid—Effect of*

The whole idea of a test of identification parade is that witnesses who claim to have seen the culprits at the time of the occurrence are to identify them from the midst of other persons without any extrinsic aid The identification test is usually adopted during the investigation of a crime by the police when the witnesses are interrogated for the first time and state that they had seen some persons committing the crime but do not know their names and would be able to identify them if they would see them again The identification test is a check upon their veracity These proceedings are in the nature of tests and the courts regard them as facts which establish the identity of anything or person The facts are to be proved according to law and in the absence of such proof the identification proceedings are valueless The fact if proved can be used both for purposes of corroboration as well as for contradiction

The standard of judging the identification evidence of the persons arrested on the spot would be quite different from the general identification normally held of the culprits arrested long after the crime In the latter case the witnesses are required to identify the accused whom they saw committing the crime Proper identification would depend on numerous factors such as one's power of observation distance time and light etc The result would also be affected if the identification held long after the incident but in the case of arrest on the spot the identification would be directed mainly to test the credibility of the witness who actually helped or effected the arrest. In such a case the attention of the witness would be solely concentrated on the person arrested If several culprits

* While sitting at Lucknow

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are arrested by different persons, it is not necessary that such a witness must know about all the arrests So even if some mistakes are committed in the identification of others that would not detract from the value of evidence of such a witness For all these reasons it would not be necessary to assess the value of such identification on the basis of the results of earlier identifications held in respect of the persons not arrested on the spot

The mere fact that the investigation was done by the Station Officer who took active part in the raid was not sufficient to condemn the prosecution case outright though certainly it would have been advisable if the investigation had been done by some other independent agency

Balwant v *The State* (1) does not lay down the correct law

Criminal Appeal no 870 of 1965 and Criminal Appeal nos 92 169 228 and 876 of 1965 and Jail Appeal nos 817 and 820 of 1965 against the judgment and order dated February 9 1965 passed by S P Sharma Assistant Sessions Judge Hardoi in S T nos 150 and 167 of 1964

The facts appear in the judgment

K N Kapoor for the Appellant

R K Rai, for the Respondents

The following judgment of the Court was delivered by—

Sahgal, J —Jagnu and Mahesh Singh residents of village Jamsara Minna of Chandrapur Mohan of Kantha, Rampal Singh and Ram Singh of Masurha Jawahar, Chhotey Lal and Gayari of Virahimpur Hari har Singh of Jagsura—all within the police circle Sandila—and Sumer of village Sahoria, within the police circle Baghauli in the district of Hardoi were tried for the offence under s 399/402 Indian Penal Code by the Assistant Sessions Judge Hardoi The charge

(1) All Cr Cases 1964 p 948

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Sahgal J

against them was that on the night between the 18th and 19th December, 1963 they collected in the grove of Ram Nath in village Bhargahna after having made preparations to commit dacoits at the house of Khurram Chamar Jagnu Sumer and Jawahar were further charged under s 25(a) of the Arms Act Jagnu Mohan Sumer and Harihar Singh were acquitted The remaining seven namely Mahesh Singh Minna Ram Pal Singh Ram Singh Jawahar Chhotey Lal and Gayari were convicted and awarded five years rigorous imprisonment each under s 399 and 402 Indian Penal Code (each count) Jawahar was also sentenced to one year s rigorous imprisonment under s 25(a) of the Arms Act The State has filed Criminal Appeal no 376 of 1965 against the acquittal of Jagnu and Sumer No Government Appeal has however been filed against the acquittal of Mohan and Harihar Singh The three other represented Criminal Appeals nos 92 of 1965 109 of 1965 and 288 of 1965—have been filed by Ram Singh, Rampal Singh Mahesh Singh Jawahar and Minna against their conviction on the various charges The remaining two appeals namely Jail Appeals nos 317 of 1965 and 320 of 1965 are the unrepresented jail appeals of Chhotey Lal and Gayari Since all these appeals arise out of the same trial we propose to dispose them of together

We have heard the learned counsel for the appellants and the Assistant Government Advocate for the State

The case for the prosecution in brief is that on 18th December 1963 at about 7 30 p m Raghubir Singh Station Officer police station Sandila got the information from an informant that Jagnu Mahesh Singh Minna, Mohan, Rampal Singh Ram Singh Jawahar Chhotey Lal Gayari Sumer and Harihar Singh were planning to collect in the grove of Ram Nath in village

Bhargahna police station Sandila that night after having made preparations to commit dacoity at the house of Khurram Chamar of village Pausra Khera hamlet of Khargahna (An entry about that information was made in the general diary vide Extract Ext Ka 16) He immediately deputed Bhagwati and Bari Nath constables to guard the house of Khurram Chamar (About that also an entry was made in the general diary vide Extract Ext Ka 17) At about 8 15 p m the Station Officer left the thana with the police party for the grove of Gulab Das situated near village Bhargahna Some constables were sent to call respectable public witnesses They brought eight witnesses including Kedar Nath PW 3 Shahzade PW 4 Bharosey PW 5 Raja PW 7 Daval Shanker PW 8 Bashir PW 9 and Mewa Lal PW 10 Thereafter the entire party was informed of the purpose of their collecting there and necessary instructions were also issued They were further told that after it was satisfied that the dacoits had collected for committing the dacoity signal would be given by firing a very light pistol Then they left for the grove of Ram Nath There the entire party was divided into three groups Party no 1 was under the leadership of Station Officer Raghubir Singh PW 22 and was posted on the western side of the grove Party no 2 was headed by S I Mukhtar Ali PW 6 and was posted towards north of the grove Similarly the third party was headed by S I Chandrapal Singh PW 2 and was posted towards east of the grove The southern side was left open as according to the information received the dacoits were expected to come from that side At about 11 p m the dacoits started coming and they collected by midnight They were smoking bidis and talking among themselves After all the *badmashes* had collected, one of the dacoits said 'Now is the time There is no licence holder in the village Dacoity be

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committed Thereupon, the other dacoit remarked, We have sufficient ammunition Khurram Chamar is a wealthy person and we would get sufficient booty This talk was overheard by the members of the hiding party When the Station Officer was satisfied that they were really dacoits and had collected there to commit a dacoity he fired five shots from a very light pistol This produced sufficient light The members of the raiding party also possessed torches and firearms They all immediately rushed towards the badmashes and after inflicting some injuries succeeded in arresting Jagnu Sumer Jawahar Gayari and Chhotey Lal on the spot Their other companions however managed to escape The members of the raiding party claimed to have seen and identified those badmashes in the light of torches and very light pistol The arrested persons were searched on the spot From the possession of Chhotey Lal one bag Ext 1 containing Chhent (chisel) Ext 2 iron bar, Ext 3, hammer Ext 4 and a torch Ext 5 were recovered under the memo Ext Ka 8 Similarly from the possession of Jawahar, one country made pistol Ext 8, two live cartridges Exts 9 and 10, one empty cartridge from the barrel of the pistol, Ext 11 and one torch Ext 12, were recovered under the memo Ext Ka-4 From the possession of Sumer one country made pistol, Ext. 16, two live cartridges Exs 17 and 18 and one torch, Ext 19 were recovered under the memo Ext Ka 6 From the possession of Jagnu, one country made gun, Ext 32 and four live cartridges, Exts 33 to 36 were recovered under the memo Ext Ka 9 Similarly from the possession of Gayari, one kanta, Ext 37 was recovered under the memo Ext Ka 10 Jawahar, Sumer and Jagnu held no licence for the firearms and ammunition recovered from them From the grove of Ram Nath, some empty cartridges, three *lathis* and other miscellaneous articles, such as, match boxes match sticks and

the burnt pieces of *bidis* were recovered under the memos Ext 5 and 7 The arrested persons with the seized property were removed to the *thana* where a report Ext Ka 20 was lodged by the Station Officer Raghubir Singh at 7 a m The distance of the police station from the scene of occurrence was about three miles The arrested persons and the witnesses were interrogated Ram Singh and Ram Pal Singh were arrested on 15th January 1964 Mahesh Singh was arrested on 29th December 1963 Munna was arrested on 21st December 1963 They were put up for identification on 1st February 1964 and 22nd February 1964 After due investigation and obtaining sanction for the prosecution under the Arms Act charge sheets were submitted against all the eleven accused persons

The prosecution in support of its case in all examined 23 witnesses Out of them, Chandrapal Singh PW 2 Kedar Nath PW 3 Shahzade PW 4 Bearosey PW 5 Mukhtar Ali PW 6 Rajja PW 7 Dava Shanker PW 8, Basir, PW 9 Mewa Lal PW 10 Surendra PW 11 Ram Singh PW 12 Sohan Lal PW 13 Mohd Kazim Singh PW 21 and Raghu Bir Singh PW 22 are the eye witnesses of the occurrence The remaining witnesses are mostly of a formal nature

The accused pleaded not guilty and denied the charges They attributed their false prosecution to enmity

The defence of Jagnu was that he had been earlier acquitted in a case under ss 399 and 402 Indian Penal Code and for that reason he had been falsely roped in

The defence of Mahesh Singh was that he was arrested from his house and brought to the *thana* He was also prosecuted in several cases but was acquitted and so he had been falsely roped in He further pleaded that Mukhtar Ali knew him from before

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The defence of Mimna was that the witnesses saw him at the place. He further pleaded that he was on inimical terms with Jagnoo and he got him falsely implicated in the case.

The defence of Rampal Singh was that since he did not give evidence in the Mohanan case he had been falsely implicated.

The defence of Ram Singh was that he was the brother of Rampal Singh and since the police was displeased with him they also got him falsely implicated.

The defence of the other accused was that the witnesses knew them from before and they had also been shown by the police. The witnesses gave evidence against them under pressure of the police.

It appears that out of the five persons arrested on the spot all except Jagnu claimed identification. Out of these, the Sessions Judge acquitted Jagnu and Sumer mainly on the ground that either they were not put up for identification or the evidence of identification against them was insufficient. Out of the other group who were not arrested on the spot and the evidence against whom was purely of identification the trial Judge acquitted Mohan and Harihar Singh for want of sufficient proof. He however convicted the remaining seven accused persons and sentenced them to various terms of imprisonment.

The defence in short was that the entire prosecution case was a pure concoction.

So the questions that arise for consideration are (1) whether on the night between the 18th and 19th of December 1963 the appellants or any of them had collected in the grove of Ram Nath in village Bhargahna after making preparations to commit dacoity at

the house of Khurram Chamar (2) whether the raid was made by the police as alleged by the prosecution and the appellants or any of them were arrested on the spot, and (3) whether the conviction of the appellants or the acquittal of Jagnu and Sumer was justified

The direct evidence in the case relating to the occurrence consists of the statements of S I Chandrapal Singh P W 2 S I Mukhtar Ali P W 6 Surendra Singh, Constable, P W 11 Ram Singh Constable P W 12 Sohan Lal Constable P W 13 Mohammad Kazmi Head Constable P W 21 Raghubir Singh Station Officer P W 22 Kedar Nath P W 1 Shahzade P W 4, Bharosey P W 5 Raja P W 7 Dan Shanker P W 8 Bashir P W 9 and Mewa Lal P W 10 Out of them the first seven are of the police personnel while the remaining seven are from the public S I Chandrapal Singh P W 2 was posted as Sub Inspector at police station Sandila On 18th December 1965 he accompanied the Station Officer Raghubir Singh in connection with the raid He possessed a revolver and a torch According to the witness the entire police party first went to the grove of Gulab Das There some public witnesses were also called They were told the purpose of their collecting there and some instructions were also issued From there all proceeded to the grove of Ram Nath There three parties were formed One was under the leadership of the witness namely S I Chandrapal Singh The other two parties were headed by Station Officer Raghubir Singh and S I Mukhtar Ali All these parties were posted towards east west and north of the grove The southern side was left open The dacoits started collecting at about 11 p m After the *badmashes* had assembled at about midnight they started smoking and talking The witness claimed to have overheard them talking They said There was no licence holder in the village

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and they possessed sufficient ammunition They must now commit the dacoity at the house of Khurram Chamar and they would get sufficient wealth as Khurram Chamar was a wealthy man The witness further stated that Station Officer Raghubir Singh gave the signal by firing very light pistol Immediately all the parties rushed towards the *bramasles* After inflicting some injuries they succeeded in arresting five of them namely Jagnu, Gayari Sumer Chhotey Lal and Jawahar on the spot while their other companions managed to escape Then he deposed about the recoveries made from Chhotey Lal and the miscellaneous articles such as burnt pieces of *bidis* match boxes match sticks etc collected by the Station Officer from the grove Kedar Nath Shahzade, Bharosey S I Mukhtar Ali Raja Daya Shanker, Bashir Mewa Lal Constable Surendra Singh Constable Ram Singh Constable Sohan Lal Head Constable Mohammad Kazmi and Raghubir Singh P Ws consistently supported the prosecution story on all its material details They also proved the various recoveries made from the possession of the other arrested persons They also stated that Jagnu Jawahar and Sumer did not possess any licence for the firearms and ammunition which were recovered from them The arrested persons with the seized property were removed to the *thana* where a report was lodged by Raghubir Singh Station Officer the next morning The trial Judge has given cogent reasons for accepting the evidence of these witnesses No direct enmity with the accused could be established So, they had no apparent motive to manufacture a false case against them

The evidence referred to above satisfactorily establishes the prosecution story about the raid It is further supported by the various entries appearing in the general diary regarding the information received,

the deputing of two constables for guarding the house of Khurram Chamar where the dacoity was apprehended, and the organising of the raid by the Station Officer Raghubir Singh. There is also an entry in the general diary about the return of the party to the police station with the arrested persons and the seized property. The report of the incident was also made at the police station without delay. On all this evidence the trial Judge was justified in holding that some *badmashes* had actually assembled in the grove of Ram Nath after having made preparations for committing dacoity at the house of Khurram Chamar that night. In the raid, the police also succeeded in arresting some *badmashes* who possessed unlicensed firearms and ammunition. Their other companions however managed to escape and so they could not be arrested. We have carefully considered the entire evidence on the record and see no good reason to disagree with the view taken by the trial Judge.

On behalf of the appellants it was pointed out that since the prosecution failed to prove the injuries alleged to have been received by the persons arrested on the spot, the circumstance threw grave doubts on the correctness of the prosecution case. We however find ourselves unable to subscribe to that view. In the struggle that must have started at the time of the raid it was quite probable that the persons who attempted to evade arrest sustained some injuries, but for the purposes of the case the existence or non existence of those injuries was not very material. No charge for causing injuries to the accused was under investigation. So the appellants are not entitled to get any advantage of that circumstance.

It was next contended that although according to the prosecution firing took place at the time of the raid no shot injuries were received by any member of the raid

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ing party or the accused It was also stressed that no shot marks could be detected even on the trees which existed in the grove That circumstance alone in our opinion was not sufficient to condemn the prosecution case In that connection no specific question were put to the investigating officer or the witnesses We do not know whether the shots were fired in the air or were actually aimed at somebody Ordinarily on such occasions firing is resorted to simply to terrorise the miscreants So this contention too has not much substance

It was next contended that the police had received information about the proposed assemblage of the *badmashes* some time in the evening It was not clear why a raid was organised and no attempt was made to arrest them straightaway In that connection also no specific questions were put to the investigating officer The information was received some time at 7 30 in the evening It is quite possible that due to short notice the police did not consider it proper to take any risk So, they immediately deputed two constables to guard the house of Khurram Chamar and arranged for the raid In the circumstances the action taken by the police was quite natural

It was also urged that Khurram Chamar whose house was alleged to have been guarded was never produced by the prosecution That omission was of little significance It was quite possible that Khurram Chamar even did not know about the apprehended dacoity or the fact that his house was being guarded by the police So this contention too had no substance

It was next contended that the conversation of the dacoits alleged to have been overheard by the witnesses was artificial All the witnesses consistently stated that they overheard the talk which passed between the

badmashes from their hiding places The *badmashes* had collected in a lonely and secluded grove They did not think if their talk could be overheard by any body In the circumstances there was nothing improbable if they freely talked among themselves We do not agree that the conversation which was overheard by the witnesses was either artificial or unnatural

Lastly it was contended that Raghubir Singh Station Officer who took active part in the raid also investigated the case, and on that ground the investigation was tainted and it resulted in gross prejudice Certainly, it would have been advisable if the investigation had been done by some other independent agency but the mere fact that the investigation was done by Raghubir Singh Station Officer was not sufficient to condemn the prosecution case outright He made himself available for cross examination to the accused We are not satisfied if any real prejudice had been caused in the case So on a consideration of the entire material on the record we are satisfied that the police actually made a raid that night in the grove of Ram Nath and there some *badmashes* had collected to make preparations to commit a dacoity, and some of them were arrested with firearms on the spot while others fled away

Next we shall examine the cases of the accused who were not arrested on the spot and against whom the evidence was purely of identification They are Ram Singh Rampal Singh Mahesh Singh and Munna

For assessing the value of the identification the first question for consideration would be whether the witnesses really had sufficient light and opportunity to see and identify the *badmashes* that night It was a dark night Soon after the very light pistol was fired complete confusion would have prevailed The members of the different parties rushed towards the dacoits who attempted to run away They struggled and succeeded in arresting some of them on the spot Others how

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ever fled away. It was said that in the light produced by the firing of the very light pistol and the torches flashed by the members of the raiding party and the dacoits the witnesses could see and identify them. We, however, find it difficult to believe that in that atmosphere of extreme tension and panic the witnesses could properly see the miscreants in the fleeting light of the torches or the momentary light produced by the firing of the very light pistol. In the circumstances, the evidence of identification has to be judged with great care and caution.

Ram Singh and Rampal Singh were arrested on 15th January 1964, and were put up for identification on 22nd February 1964 nearly after two months of the occurrence. Ram Singh was correctly identified by Shahzade, Bharosey Ram Singh, Daya Shanker and Surendra Singh, P Ws. Similarly Rampal Singh was correctly identified by Kedar Nath Bharosey Daya Shanker and Surendra Singh P Ws. Shahzade identified one person correctly and committed two mistakes. Bharosey correctly identified two persons and committed no mistake. Ram Singh correctly identified one person and committed two mistakes. Daya Shanker correctly identified two persons. Surendra Singh correctly identified two persons and committed one mistake, *vide* Ex. Ka 2. Kedar Nath correctly identified three persons and committed no mistake. It is significant that the performance of these witnesses at the earlier parade held on 1st February, 1964 was extremely poor. Shahzade could not identify anybody correctly and committed two mistakes. Bharosey correctly identified one person and committed one mistake. Ram Singh correctly identified two persons and committed no mistake. Daya Shanker could not identify anybody correctly and committed two mistakes. Kedar Nath correctly identified one person and committed one mistake. Surendra Singh could not identify anybody,

vide Ex Ka 1 This poor performance at the earlier parade considerably reduces the value of the identification held on 22nd February 1964 Then the cumulative effect of the two parades was Dava Shanker correctly identified two persons and committed two mistakes Bharosey correctly identified three persons and committed one mistake Shahzade correctly identified one person and committed four mistakes Surendra Singh correctly identified two persons and committed one mistake Ram Singh correctly identified three persons and committed two mistakes Kedar Nath correctly identified four persons and committed one mistake It is practically admitted that Kedar Nath knew Ram Singh from before Similarly Sohan Lal Murli Singh and Teg Bahadur Singh Constable knew Rampal Singh Ram Singh and Mumtaz accused from before This fact is even mentioned in the first information report Sohan Lal has admitted in his evidence that both Rampal Singh and Ram Singh were prosecuted for obstructing the police in the discharge of their duties, in 1964 This gives an indication that the relations of these two accused with the local police were not quite good and they were known to some of the witnesses of the raiding party from before So no implicit reliance could possibly be placed on such identification evidence In our opinion the charges against these two accused have not been satisfactorily established They must be acquitted

Mahesh Singh was arrested on 25th December 1963 and was put up for identification on 1st February 1964 He was correctly identified by S I Chandrapal Singh S I Mukhtar Ali and Constable Ram Singh It is significant that none of the public witnesses could identify this accused S I Mukhtar Ali admittedly knew this accused from before The explanation of Raghubir Singh Station Officer Investigating Officer

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was that he was produced for identification of this accused by mistake It is also not disputed that Mahesh Singh was arrested in village Jamsara police station Sandila and was taken to *thana* Sandila The Investigating Officer could not deny if S I Chandrapal Singh and Constable Ram Singh were present at the *thana* when this accused was brought They were admittedly posted at the same police station So the possibility could not be ruled out that both S I Chandrapal Singh and Constable Ram Singh had seen Mahesh Singh after his arrest On that ground, their identification evidence is of little avail to the prosecution So the charges against this accused also fail and he must be acquitted

Munna was arrested on 21st December, 1963 from his village which lies in police station Sandila and was put up for identification on 1st February 1964 He was correctly identified by S I Chandrapal Singh S I Mukhtar Ali Constable Ram Singh and Kedar Nath In his case also the prosecution failed to prove that S I Chandrapal Singh S I Mukhtar Ali and Constable Ram Singh were not present at the *thana* (who were posted at police station Sandila) when the accused was brought and they had no opportunity of seeing him after his arrest So on that ground the identification evidence of the three police witnesses goes out No conviction could possibly be based on the solitary identification evidence of Kedar Nath So the charges against this accused also fail and he must be acquitted

Next we shall deal with the cases of the accused who are alleged to have been arrested on the spot They are Jagnu Sumer, Jawahar Gayari and Chhotey Lal All of them except Jagnu claimed identification They moved an application on 7th February 1964, which was granted on 19th February 1964 and they

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were put up for identification on 25th June 1964 The trial Judge relying on a single Judge decision of this Court reported in *Balwant* v *State* (1) held that the identification of the accused even if they were arrested on the spot was necessary and the absence of such identification was a fatal weakness to the prose cution Mainly on that ground, he acquitted Jagnu and Sumer As already stated earlier Jagnu never claimed identification but the Assistant Sessions Judge following the view taken in the above cited case came to the conclusion that the charges against him could not be proved as there was no identification As regards Sumer he held that he could not be identified by any of the prosecution witnesses He however, accepted the identification evidence against Jawahar Gavari and Chhotey Lal and convicted them The view adopted by the trial Judge is no longer good law

The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of the occurrence are to identify them from the midst of other persons without any aid or any other source The identification test is usually adopted during the investigation of a crime by the police when the witnesses are interrogated for the first time and state that they had seen some persons committing the crime but do not know their names and would be able to identify them if they would see them again The identification test is a check upon their veracity These proceedings are in the nature of tests and the Courts regard them as record of facts which establish the iden tity of anything or person The facts are to be proved according to law and in the absence of such proof the identification proceedings are valueless The fact if pro ved can be used both for purposes of corroboration as well as for contradiction *State* v *Ghulam Mohuddin* (2)

(1) 4 All Cr Cases 1961 p 443 (2) A I R 1961 All 475

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Apart from the investigation utilizing these tests for checking up their own evidence and affording the Courts later on to rely upon them as corroborative evidence the accused may in certain cases demand the holding thereof Where the prosecution has omitted to hold a test identification possibly on the theory that the witnesses know the accused from before or for some other reason the accused may apply to the Court for the holding of a test identification to check up the veracity of the witnesses who claim to know him from before In a Lahore case in *Amar Singh* v *Emperor* (1) the Court held that whenever an accused disputes the ability of the prosecution witnesses to identify him the Court should direct an identification parade to be held save in the most exceptional cases In another case of the same High Court reported in *Sajjan Singh* v *Emperor* (2) the accused before being sent up for trial applied to have the veracity of the witnesses tested by means of an identification parade The request was however refused by the Magistrate to whom it was made The application was sent first to the police for report It was reported that the statements of witnesses showed that they knew the accused from before and that the application had been made only for the purpose of delay The reason of delay however was incorrect The application had been made more than a week before the proceedings came up so that it should have been possible to arrange for a parade which would not have involved any delay About the other reason that was given the High Court thought that even to be unsound It held If an accused person is already well known to the witnesses, an identification parade would of course be only a waste of time If however the witnesses claim to have known the accused previously while the accused himself denies this, it is difficult to

(1) A I R 1943 Lah 303=45 Cr L J 98

(2) A I R 1945 Lah 454=46 Cr J J 550

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see how the claim made by the witnesses can be used as a reason for refusing to allow their claim to be put to the only practical test. Even if the denial of the accused is false no harm is done and the value of the evidence given by the witnesses may be increased. It is true that it is by no means uncommon for persons who have been absconding for a long time to claim an identification parade in the hope that their appearance may have changed sufficiently for them to escape recognition. Even so this is not in itself a good ground for refusing to allow any sort of test to be carried out. It may be that the witnesses may not be able to identify a person whom they knew by sight owing to some change of appearance or even to weakness of memory. But this is only one of the facts along with many others such as the length of time that has elapsed which will have to be taken into consideration in determining whether the witnesses are telling the truth or not. The Court further held that when such requests are refused and for no valid reason the case would more often than not end in acquittal should any serious question of identity arise during the course of the trial for the witnesses claim to identify the accused will remain subject to a doubt which might easily have been removed if their ability had been put to the test before the trial. It is too late to do anything after the trial has begun for by that time the witnesses will have become accustomed to the appearance of the accused in Court.

These views of the Lahore High Court have been dissented from in a case of the Madras High Court reported in *In re Sangiah* (1) and a case of the Allahabad High Court reported in *State* v. *Ghulam Mohiuddin* (2). In the Madras case the Court held "I am unable to find any provision in the Code which entitles an

(1) A.I.R. 1941 Mad. 110=(1941) 1 Cr. L.J. 1.
(2) A.I.R. 1944 All. 1=1943 A.L.J. 487.

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Sarkar J.

accused to demand that an identification parade should be held at or before the enquiry or the trial An identification parade belongs to the stage of investigation by the police The question whether a witness has or has not identified the accused during the investigation is not one which in itself is relevant at the trial The actual evidence regarding identification is that which is given by the witnesses in Court The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court If the witness has not identified the accused at a parade or otherwise during the investigation, the fact may be relied on by the accused but I find nothing in the provisions of the Code which confers a right on the accused to demand that the investigation should be conducted in a particular way Identification parade is a part of the investigation and once the case has reached the stage of an enquiry before the Magistrate the investigation is at an end and all that takes place thereafter should take place in Court and form part of the record of the case If a case is posted for trial, any test as to the ability or credibility of the witnesses should be decided only in Court and not by means of an identification parade the proceedings of which will not form part of the record of the Court The Court however held that if the accused makes a request that he be mingled with other persons in the dock and then the P Ws may be asked to pick him up that request would be granted in all course

The case in the Allahabad High Court, *State* v *Ghulam Mohiuddin* (1) also proceeds on the same lines It held that in cases where a Magistrate takes cognizance of an offence upon a police report or upon a private complaint, the accused may inform the Court that

(1) 1961 A L J 437=A I R 1961 All 478

he is not known to the prosecution witnesses and even suggest that the prosecution may arrange for an identification parade for his identification but he cannot ask the Court to direct the prosecution to arrange for such a parade, and the Court cannot make an order for the holding of a regular identification parade obviously because there is no provision of law under which the Court can issue any such direction The Court may however in such cases satisfy itself by asking the accused to stand among other persons present in Court and then call upon the witnesses who appear before the Court to identify the accused and make note of the result on the record The argument that if no test identification is held at the request of the accused and he has been thus deprived of an opportunity to test the veracity of the prosecution witnesses will mean a serious prejudice to him in his trial was held as not tenable The Court held that one had to proceed on assumptions that there had been no identification proceedings in the case and it is not permissible to speculate what would have been the position if certain things might have happened

The above ruling was however explained in a latter ruling of the same Court in *Lajja Ram* v *State* (1) and it was held that provided it is not too late to do so the accused can challenge the prosecution to an identification parade to falsify the claim of the eye witnesses who profess to have known him and although there is no law which could be said either to confer any right upon the accused to throw such a challenge or to impose any duty upon the prosecution to take up the challenge the prosecution that ignores that challenge without justification would be doing it at its peril When the accused puts up a challenge that the witnesses do not

Value of identification test

Sub-sec (1)

know him and that an identification test should be held unless the prosecution can nullify that claim of the accused (e.g. by showing that even though the witnesses were not put to the test of identification there is evidence *aliunde* which establishes without doubt that the accused was known to them) there would be an element of doubt attached to the testimony of witnesses in case the identification test is not held and the benefit of that doubt would go to the accused. The Court held that even if the prosecution failed in its duty to hold the identification at the request of the accused the Court concerned should order the holding of it if the accused persists before it.

In an unreported decision of this Court (Lucknow Bench) in *Mohd. Husain v. State* (1) MULLA J. took a view contrary to that taken by KATJU J. in *Bal Govind's* case (2) aforementioned. The accused before MULLA J. was also charged under s. 399 Indian Penal Code. While dealing with the question of identification MULLA J. observed:

> In a case where suspects are arrested on the spot the question of identification does not arise. The police would therefore not collect the witnesses for the purpose of getting the arrested persons identified. The trial court was right in its observations against the conduct of the Magistrate who granted the request of the appellant that an identification parade be held. In those cases where persons are arrested on the spot the question of identification does not arise. An identification is held to test the memory and observation of a witness. In this case if the witnesses had

(1) Cr. A. no. 963 of 65 (All.) decided on 2nd September 1968.
(2) All. Cr. Cases 1961 p. 249.

picked out the suspects that would not have strengthened the prosecution case at all The prosecution case depended upon the arrest on the spot and the contemporaneous entry relating to that arrest in the police papers The Magistrate was therefore ill advised when he directed that an identification parade should be held in this case

In an unreported Division Bench decision of this Court (Lucknow Bench) in *State* v *Neel Kanth* (1) the Hon ble Judges observed

> We are of the view that the case of *Balwant* v *State* (2) does not lay down the correct law Where in a case like the present one the accused is arrested at the spot all that has to be proved is that he was in fact arrested at the place and in the circumstances alleged by the prosecution and the failure of the investigating agency to put him up for test identification is not at all a weakness in the prosecution case, much less a fatal weakness As stated above the respondents in the case before us did not claim test identification and no question of holding a test identification parade at all arose in the present case and the case of the prosecution could not be rightly thrown out on the ground of absence of test identification parade

The standard of judging the identification evidence of the persons arrested on the spot would be quite different from the general identification normally held of the culprits arrested long after the crime In the latter case the witnesses are required to identify the accused whom they saw committing the crime Proper identification would depend on numerous factors such

(1) Cr A no 88 of 1965 (L B) decided on 8rd November 1966
(2) All Cr Cases 1964 p 243

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as one's power of observation distance time and light etc The result would also be affected if the identification was held long after the incident but in the case of arrest on the spot the identification would be directed mainly to test the credibility of the witness who actually helped or effected the arrest In such a case the attention of the witness would be solely concentrated on the person arrested If several culprits are arrested by different persons it is not necessary that such a witness must know about all the arrests So even if some mistakes are committed in the identification of others that would not detract from the value of evidence of such a witness For all these reasons it would not be necessary to assess the value of such identification on the basis of the results of earlier identifications held in respect of the persons not arrested on the spot In the instant case the earlier identifications were held long before the identification of these accused So on that ground too their results could not be considered in assessing the value of the identification of the accused arrested on the spot

Applying the same principles to the facts of the present case, it is clear that the acquittal of Jagnu by the Assistant Sessions Judge on the ground that he was not put up for identification was clearly erroneous As already stated earlier he never claimed identification There was ample direct evidence against him to show that he was arrested on the spot No flaw in that evidence could be pointed out on his behalf The charges under ss 399 and 402, Indian Penal Code, and s 25(*a*) of the Indian Arms Act have been fully established against him and his acquittal must be set aside

The prosecution alleged that Sumer was arrested on the spot He also claimed identification His identification was held on 25th June 1964 In the jail only

Shahzade could identify him correctly He picked out two persons correctly and committed two mistakes In the Sessions Court he even failed to identify this accused Some of the witnesses who are alleged to have arrested him failed to identify him while others were not produced by the prosecution There being practically no identification evidence against this accused it would not be quite safe to rely on the oral testimony of the witnesses against him So the charges have not been satisfactorily brought home to him and his acquittal is justified

The remaining three accused namely Jawahar Gayari and Chhotey Lal were also put up for identification on 25th June 1964 Jawahar was correctly identified by Kedar Nath Bharosey Raja and Mewa Lal P Ws Kedar Nath correctly identified two persons and committed one mistake Similarly Raja correctly identified two persons and committed one mistake Mewa Lal and Bharosey committed no mistakes Similarly Gayari was correctly identified by Kedar Nath and Raja P Ws and Chhotey Lal was correctly identified by Raja and Mewa Lal P Ws There was ample direct evidence in the case to prove that these three accused were arrested on the spot It has further been corroborated by the identification which was held at their own instance The evidence of these witnesses was rightly believed by the trial Judge Their conviction on the various charges is justified The sentences awarded for the various offences do not err on the side of severity

In the result Criminal Appeal No 876 of 1965 filed by the State against the acquittal of Jagnu is allowed His acquittal is set aside and he is convicted under ss 399 and 402 Indian Penal Code and s 25(a) of the Indian Arms Act Under ss 399 and 402 Indian

Penal Code, he is sentenced to undergo rigorous imprisonment for five years on each count and under s 25(a) of the Indian Arms Act he is sentenced to undergo rigorous imprisonment for one year The sentences shall run concurrently The appeal against the acquittal of Sumer on the charges under ss 399 and 402 Indian Penal Code and under s 25(a) of the Indian Arms Act is however dismissed

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Criminal Appeal No 92 of 1965 by Ram Singh and Rampal Singh against their conviction under ss 399 and 402 Indian Penal Code is allowed and they are acquitted

Criminal Appeal No 109 of 1965 by Mahesh Singh against his conviction under ss 399 and 402 Indian Penal Code is allowed and he is acquitted of the charges

The appeal against the conviction of Jawahar under s 399 and 402 Indian Penal Code and under s 25(a) of the Indian Arms Act is however dismissed and his conviction and sentences are maintained

Criminal Appeal No 288 of 1965 by Munna against his conviction under ss 399 and 402 Indian Penal Code is allowed and he is acquitted of the charges

Jail Appeals namely Criminal Appeals Nos 317 and 320 of 1965 by Chhotey Lal and Gayan against their conviction under ss 399 and 402 Indian Penal Code are dismissed and their conviction and sentences are maintained

Ram Singh Rampal Singh Mahesh Singh and Munna are on bail They need not surrender and their bail bonds shall stand discharged

Sumer is in jail He shall be set at liberty forthwith unless his detention be necessary in connection with some other crime

Jawahar is on bail He shall surrender to his bail The District Magistrate Hardoi is directed to get Jawahar arrested and sent to jail to serve out his sentences

If Jagnu is also on bail he shall surrender to his bail The District Magistrate Hardoi shall see that Jagnu is arrested and sent to jail to serve out his sentences The sentences of imprisonment shall run concurrently

Compliance report shall be submitted by the District Magistrate Hardoi to this Court within a month

Chhotey Lal and Gayur are already in jail and they may be informed about the result of their appeals

Ordered accordingly

APPELLATE CIVIL

*Before Mr Justice L Prasad and Mr Justice U S Srivastava**

1967 September 1

SMT RAJ KUNWARI APPELLANT,

v

DEPUTY DIRECTOR OF CONSOLIDATION, U P LUCKNOW AND OTHERS RESPONDENTS

U P Consolidation of Holdings Act, 1953 s 12—*Scope—Extent of the powers of appellate authority—Code of Civil Procedure* 1908 *Order XLI r 33—Principle deducible from—Principle applicable to appellate authorities under the U P Consolidation of Holdings Act*

S 12 of the U P Consolidation of Holdings Act as it stood prior to its amendment by U P Act VIII of 1963 in effect provides that matters to be raised in proceedings under ss 7 to 10 of the Act can be raised in proceedings under s 12 provided the cause of action for them did not exist when proceeding under ss 7 to 10 were started or were in progress

It is well settled that once the matter is taken in appeal the whole case is re opened and the powers of the appellate authority are identical with that of original authority

Though the provisions of the Code of Civil Procedure do not as such apply to proceedings under the U P Consolidation of Holdings Act nonetheless the principle deducible from O XLI r 33 C P C can be applied to the appellate jurisdiction under the provisions of the U P Consolidation of Holdings Act

Special Appeal No 188 of 1966 against the judgment and decree dated July 8 1966 passed by JAGDISH SAHAI J in Writ Petition No 183 of 1965

The facts appear in the judgment

K N Misra, for the appellant

The following judgment of the Court was delivered by —

*Write sitting at Lucknow

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SMT RAJ KUNWARI v DEPUTY DIRECTOR OF CONSOLIDATION

L PRASAD, J —This appeal is directed against the judgment of our brother SAHAI by which the appellant's petition under Art 226 of the Constitution of India has been dismissed

Disputed Khatas nos 63 and 238 were entered in the basic year in the name of Shivraj Singh who had two brothers Lalla Singh and Budhai Singh Lalla Singh had a son Raj Bahadur Singh who predeceased him and a daughter Shrimati Bishunatha respondent no 5 The appellant is the widow of Raj Bahadur Singh Budhai Singh died long ago without leaving any issue or widow The case of the petitioner is that since she was found in possession along with Shivraj Singh during partal made subsequent to the notification under s 4 of the U P Consolidation of Holdings Act a reconciliation took place before the Assistant Consolidation Officer between her and Shivraj Singh with the result that by an order dated the 29th April 1961 her name came to be entered as a co-tenure holder over the disputed Khatas along with that of Shivaraj Singh It is further alleged by the petitioner appellant that a Chak was proposed in the joint names of herself and Shivaraj Singh and the same was confirmed without there being any objection Shivaraj Singh died on the 5th December 1962 On his death three applications were moved purporting to be under s 12 of the unamended Act which governed the case One was moved by the petitioner appellant She claimed that she was entitled to succeed to the share of Shivaraj Singh as a co tenure holder since he left no heir Another was made by respondent no 5 who claimed that she was entitled to succeed to the tenancy of Shivaraj Singh and the appellant had no interest in it The third was moved by the Gram Samaj respondent no 6 alleging that on the death of Shivaraj Singh who was

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the sole tenure holder of the two Khatas her less his tenures vested in respondent no 5 It appears that the matter was initially compromised and disposed of by the Consolidation Officer but on appeal the order of the Consolidation Officer based on compromise was set aside and the matter was remanded Subsequent to remand the Consolidation Officer held that the name of the appellant came to be entered as a co tenant with Shivaraj Singh not by virtue of any order but by some subsequent interpolation and as such she was neither a co tenant in the disputed Khatas nor was she entitled to inherit the share of Shivaraj Singh by survivorship He further held that respondent no 5 was also no heir to Shivaraj Singh and was as such not entitled to inherit anything Still he concluded that since the appellant and respondent no 5 were in respective possession of some specific plots they were entitled to retain the same He therefore ordered those specific plots to be entered in the names of the appellant and respondent no 5 respectively In the circumstances he dismissed the application of respondent no 6 Aggrieved by his order each of the appellant and respondent no 5 preferred an appeal Respondent no 6 did not prefer any appeal but submitted to the order In appeal the Assistant Settlement Officer (Consolidation) after getting the original record summoned came to the conclusion that the entry alleged to have been made in favour of the appellant on the basis of some specific order of reconciliation dated the 20th April 1961 was a subsequent interpolation and in fact no such order was ever passed In the course of his judgment dated 14th August, 1964 a copy of which is Annexure 2 to the petition the Assistant Settlement Officer (Consolidation) observes

> In his judgment the learned Consolidation Officer has also held the same view about the

entries in the name of Smt Raj Kunwar and has observed that such entries are only a mistry Even then the appellant has failed to prove or to produce any such order of any competent court whereby her name was added as discussed by me above

He accordingly came to the conclusion that neither the appellant nor respondent no 5 had any interest in the disputed Kharis which belonged to Shivaraj Singh alone and vested in the Gram Samaj i e respondent no 6 on the death of Shivaraj Singh heirless Aggrieved by this order each of the appellant and respondent no 5 preferred a revision Both these revisions were dismissed by the Deputy Director of Consolidation by his order dated the 5th December 1964 It was in these circumstances that a petition under Art 226 of the Constitution of India giving rise to this appeal was filed by the present appellant As already stated his petition has been dismissed Hence the petitioner has come up in appeal

Only respondent no 5 has put in appearance None of the other respondents has put in appearance despite service

We have heard the learned counsel for the appellant His contention is two fold The first contention is that in a proceeding under s 12 of the U P Consolidation of Holdings Act as it stood prior to its amendment by U P Act VIII of 1963 the Consolidation authorities are not competent to entertain and dispose of questions such as raised in the instant case by which respondent no 6 challenged the very entry in the name of the appellant as a co tenure holder with Shivaraj Singh S 12 of the U P Consolidation of Holdings Act in effect provides that matters to be raised in proceedings under ss 7 to 10 of the Act can

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A. Ramaiah J.

be raised even in a proceeding under s 12 provided the cause of action for them did not exist when proceedings under ss 7 to 10 were started or were in progress That being so it is obvious that it is incorrect to maintain that in no circumstances in a proceeding under s 12, questions like those raised by respondent no 6 could be raised Two things are clear from the findings recorded by the Assistant Settlement Officer (Consolidation) in appeal namely (1) that no order of reconciliation dated the 29th April 1961 as claimed by the appellant was ever actually passed and (2) that the appellant s name came to be interpolated in C H Forms 23 and 25 sometime subsequently In view of these findings of fact which are based on a sound reasoning as appears from a perusal of the judgment passed by the Assistant Settlement Officer (Consolidation), it follows that the cause of action for the points raised by respondent no 6 in his application moved under s 12 subsequent to the death of Shivaraj Singh did not at all exist at the stage proceedings under ss 7 to 10 were taken So there is no escape from the conclusion that on the facts of the present case the Consolidation authorities were fully competent to entertain and dispose of the points raised by respondent no 6 in his application under s 12 of the Act We therefore repel the contention

The other contention is that since respondent no 6 mitted to the order passed by the Consolidation Officer and did not choose to go in appeal the appellate and revisional authorities under the provisions of the U P Consolidation of Holdings Act could at the most dismiss the claim of the appellant put forth by an application under s 12 of the Act but in no circumstance could deprive her of the right she held by virtue of the entries in her favour in C H Forms 23 and 25 to the effect that she was a co tenure holder with Shiva

raj Singh in the disputed Khatas This contention also appears to be without any substance O XLI, r 33 of the Code of Civil Procedure provides that the appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection It is true that the provisions of the Code of Civil Procedure do not as such apply to proceedings under the U P Consolidation of Holdings Act Nonetheless we see no reason as to why the principle deducible from the aforementioned provisions be not applied to the appellate jurisdiction under the provisions of the U P Consolidation of Holdings Act It is well settled that once the matter is taken in appeal the whole case is reopened and the powers of the appellate authority are identical with that of original authority The learned single Judge has discussed at length to make out that respondent no 6 was a necessary party to the appeal and the revision preferred by the appellant one after the other from the order of the Consolidation Officer If the appellant failed to implead respondent no 6 in the appeal or in revision she can take no advantage of her own omission In spite of this omission the power of the appellate and revisional authority would remain the same namely that it would have exactly the same power in dealing with the claim of the appellant which the Consolidation Officer had before whom all the three namely the appellant, respondent no 5 and respondent no 6 had applied for mutation in their favour on the grounds stated by each of them respectively

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S. Prasad J.

On the findings of fact recorded by the Consolidation Officer himself it is obvious that the manner in which he chose to distribute the various plots of the two Khatas between the appellant and respondent no 5 was palpably wrong So if the appellate authority affirmed these findings of fact arrived at by the Consolidation Officer it had to pass the correct order which should have been passed by the Consolidation Officer himself On the finding that the name of the appellant came to be interpolated subsequently without any order whatsoever to support it and that Shivaraj Singh was the sole tenure holder of the disputed Khatas and that he died heirless the Consolidation authorities had not only to dismiss the claim of the appellant and respondent no 5 but had also to undo the fraud by directing expunction of the name of the appellant which was entered as a co tenure holder with Shivaraj Singh over the disputed Khatas Once that is done the necessary consequence would be as appears from ss 189 and 194 of the U P Zamindari Abolition and Land Reforms Act that the disputed Khatas would vest in the Gram Samaj namely respondent no 6 and for that no express order in favour of respondent no 6 is necessary We have thus no doubt that the impugned orders did not call for any interference by the Court in exercise of its jurisdiction under Art 226 of the Constitution of India and the writ petition was therefore rightly dismissed

For the reasons given above we see no substance in the appeal and dismiss it We make no orders as to costs

Appeal dismissed.

ELECTION PETITION

*Before Mr Justice G D Sahgal**

KRISHNA BEHARI PETITIONER,

v

JITENDRA BAHADUR SINGH

OPPOSITE PARTY

1967

September 27

Representation of the People Act, 1951 *ss* 87 *proviso* 100(1) (*b*)—*Corrupt practice—Corrupt practice committed by the rival candidate i e respondent no* 10 *who was set up by the returned candidate i e respondent no* 1—*No allegation that it was so committed with the consent of the returned candidate—Presumption of consent cannot be inferred with regard to corrupt practice—Issue regarding corrupt practice committed by respondent no* 10 *not material*

In order that the election may be declared void on account of a corrupt practice committed by the rival candidate i e respondent no 10 who was set up by the returned candidate i e respondent no 1 this corrupt practice must be declared to have been committed by him with the consent of the returned candidate or with the consent of his election agent The mere fact that respondent no 10 was set up by respondent no 1 does not necessarily mean that any corrupt practice committed by respondent no 10 must have been committed by him with the consent of respondent no 1 or latters election agent There can be no presumption that respondent no 10 was an agent with the consent of respondent no 1 for the purpose of committing a corrupt practice

The issue of corrupt practice committed by respondent no 10 is not material for the purpose of the case for even if it is found that the alleged corrupt practice was committed by respondent no 10 there being no allegation that it was committed with the consent of respondent no 1 no evidence would be allowed to be led that it was so

Election petition no 7 of 1967

The facts appear in the judgment

M P Srivastava and *Umesh Chandra Srivastava*, for the petitioner

*While sitting at Lucknow

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SHRI BIN BHUSAN SINGH v. PRESIDING OFFICER, LABOUR COURT

Bishan Singh, Ramesh Singh and *Vishal Singh*, for respondent no 1

R B Bisaria, for respondent no 3

SAHGAL, J —This election petition comes up today for deciding as to whether issue no 3 is at all material to the case and whether any evidence should be allowed to be led on this issue

Issues were struck in the case on the 15th September, 1967 Issue no 3 out of those issues reads as follows

> Was Sahdullah, respondent no 10 set up as a candidate by respondent no 1 in his own interest ?

Did Sahdullah make an appeal to the Muslim electorate to vote for him by giving out his name as Sahdullah Khan Ghazi as given in Schedule A ?

Does the word Ghazi have any special significance and did he ask the Muslim electorate to vote for him as a Ghazi ?

Did this act of his amount to fraudulent device and contrivance resorted to by him to interfere with free exercise of electorate right of Muslim electorate ?

The point as to whether this issue is material to the case or not has to be decided in view of the proviso to s 87 of the Representation of the People Act 1951 (hereinafter called the Act) The proviso gives discretion to the High Court to refuse for reasons to be recorded in writing, to examine any witness or witnesses if it is of the opinion that the evidence of such a witness or witnesses is not material for the decision of the petition

In order to decide the point as to whether this issue is material or not we have to assume that the allega

tions made in the petition giving rise to this issue are correct Then it has to be seen that even if all these allegations are correct will they at all affect the result of the petition and give the petitioner a ground for allowing the petition ? The allegations are contained in para 11 ground (c)

The contention of the petitioner as set up in ground (c) is that respondent no 10 Sabidullah was set up as a candidate by respondent no 1 in his own interest as he had no hopes of getting Muslim votes and respondent no 10 had every chance of getting Muslim votes The petitioner then goes on to describe that in getting those votes he was guilty of corrupt practice which has been described therein The question is whether any corrupt practice committed by a rival candidate does give a ground to the petitioner for declaring the election void even if he has been set up by the returned candidate himself ?

The relevant provisions are contained in s 100 of the Act and short of the portions of that section which are not relevant for the purpose of this enquiry they read as follows

> 100 (1) Subject to the provisions of sub s (2) if the High Court is of opinion—
>
> (a) , or
>
> (b) that any corrupt practice has been committed by a returned candidate or his election agent or any other person with the consent of a returned candidate or his election agent or

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Mahajan J.

(c) , or

(d) that the result of election in so far as it concerns a returned candidate, has been materially affected—

(i) , or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent or

(iii) , or

(iv)

the High Court shall declare the election of the returned candidate to be void

(2) If in the opinion of the High Court a returned candidate has been guilty by an agent other than his election agent of any corrupt practice but the High Court is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent and every such corrupt practice was committed contrary to the orders and without the consent of the candidate or his election agent

(b) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents

then the High Court may decide that the election of the returned candidate is not void

Learned counsel for the petitioner points out that his case relates to cl (*b*) of sub s (1) of s 100 and is not covered by cl (*d*)(ii) of that sub section Let us therefore examine what does cl (*b*) provide It provides for the election of the returned candidate to be declared void if the High Court finds that any corrupt practice has been committed by the returned candidate or his election agent or by any other person with the consent of the returned candidate or his election agent The corrupt practice is said to have been committed in this case by respondent no 10 Respondent no 10 is not the returned candidate He is not his election agent either for that is not the allegation He is a third person In order that the election may be declared to be void on account of a corrupt practice committed by him this corrupt practice must be declared to have been committed by him with the consent of the returned candidate, that is respondent no 1 or with the consent of his election agent There is no allegation in the petition that the corrupt practice alleged to have been committed by respondent no 10 was committed by him with the consent of respondent no 1 What has been alleged is that respondent no 10 had been set up by respondent no 1 in his own interest to wean (?) away Muslim votes from the other rival candidates of respondent no 1 probably because respondent no 1 himself did not stand the chance of getting such votes The mere fact that respondent no 10 was set up by respondent no 1 does not necessarily mean that any corrupt practice committed by respondent no 10 must have been committed by him with the consent of respondent no 1 or the latter s election agent

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SINGH

Shah J.

The learned counsel for the petitioner draws his attention to the provisions of s 99(2) of the Act read with s 123(7) Explanation Sub s (2) of s 99 provides that in s 100 expression agent has the same meaning as s 123 The Explanation of sub s (7) of s 123 provides that in this section the expression agent includes an election agent a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate The contention is that as respondent no 10 acted on behalf of respondent no 1 having been set up by him he was his agent and as he is his agent the presumption is that whatever he did (?) with his consent Thus, any corrupt practice that might have been committed by respondent no 10 according to this argument, must be deemed to have been committed with the consent of the returned candidate respondent no 1 and the case will thus come within the mischief of cl (*b*) of sub s (1) of s 100

This argument it is difficult to accept If respondent no 10 was an agent at all of respondent no 1 he was an agent in connection with the election with the consent of respondent no 1 There can be no presumption that he was an agent with the consent of respondent no 1 for the purpose of committing a corrupt practice There is no justification for equating consent for acting as an agent in connection with the election with consent in connection with the committing of a corrupt practice

That, in my opinion ends the matter and for want of there being any allegation in the petition that the corrupt practice referred to in issue no 3 was committed by respondent no 10 with the consent of res

pondent no 1 the issue is not material for the purpose of the case for even if it is found that the alleged corrupt practice was committed by respondent no 10, there being no allegation that it was committed with the consent of respondent no 1 any evidence would be allowed to be led that it was so and any evidence that might be led in the case to show that respondent no 10 committed the said corrupt practice would be useless for the purpose in the case

Learned counsel however drew my attention to an authority of the Mysore High Court in *Adiveppa Reddi v. Gangi Reddi* (1) in support of his contention In order to appreciate the law laid down in that case we have to look to the provisions of s 100 as they stood at the time relevant for the purpose of that case At that time though cl (*b*) of sub-s (1) of s 100 was the same as it is at present except that for the words High Court we had the word Tribunal, cl (*d*)(ii) was differently worded It was worded as follows

> (*d*) that the result of the election in so far as it concerns a returned candidate has been materially affected—
>
> (i)
>
> (ii) by any corrupt practice committed in the interest of the returned candidate by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent or

(1) 21 I L R 217

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Jasti J.

It would thus appear that the committing of a corrupt practice by a returned candidate through an agent did not specifically come into the picture at all in sub s (1) of s 100 as it stood at that time Subs (2) which was an exception to subs (1) however referred to the corrupt practice being committed by the returned candidate through an agent The question therefore arose as to whether such a corrupt practice to which subs (2) of s 100 was exception was covered by cl (*b*) of subs (1) or cl (*d*) of that sub-section If such a case was covered by cl (*d*) the difficulty was that even if the result of an election had been materially affected by a corrupt practice committed in the interests of the returned candidate by an agent the election would not be declared to be void if it was found that it was committed without the consent of the candidate or the election agent, that the candidate and his election agent had taken all reasonable means for preventing the commission of corrupt practices and that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents There was a cl (*b*) also in subs (2) of s 100 at that time but we are not concerned with it for the present in order to appreciate the argument Thus cl (*d*)(ii) of subs (1) of s 100 would also cover the case of a corrupt practice committed by a person other than an agent in the interests of the returned candidate but as his case would not be covered by the exception contained in subs (2) of that section which is confined to the corrupt practice committed by an agent only its effect would be that the election of the candidate by the commission of a corrupt practice by a rank outsider if it materially affects the result of the election would become void even though that corrupt practice might have been committed without the consent of the candidate or his election agent or in spite

of all precaution being taken by him or his election agent for preventing its commission but not if it is committed by an agent in similar circumstances Such a result could not have been contemplated by the Legislature The Bench of the Mysore High Court, therefore, thought that sub s (2) was an exception to cl (*b*) of sub s (1) of s 100 if the corrupt practice contemplated therein was committed by an agent which term is included in the phrase any other person, the consent of the candidate for committing the corrupt practice being presumed in such a case

The matter however came up before a Bench of this Court also on two occasions in *Moti Lal* v *Mangla Prasad* (1) and *Ghayur Ali Khan* v *Keshav Gupta* (2) and it was of opinion that sub s (2) of s 100 was a superfluous piece of legislation It was pointed out that in the Act before its amendment in 1956 by Act 27 of 1956 under sub s (2)(*b*) the Tribunal could set aside any election if a corrupt practice was committed by any ordinary agent with the connivance of the returned candidate Then came sub s (3) which was word by word the same as the present sub s (2) except for an insignificant difference In that setting sub s (3) as it then was had a meaning because it provided an exception to cl (*b*) of sub s (2) but after the amendment sub s (2) of s 100 became an entirely superfluous and meaningless piece of legislation having been thoughtlessly retained after the amendment of s 100 The difficulty in giving a meaning to sub s (2) of s 100 after the amendment of s 100 in 1956 was faced by the Madras High Court also in *M A Muthiah Chettiar* v *So Ganesan* (3) also by the Rajasthan High Court in *Sheopat Singh* v *Harish Chandra* (4) and also the Bombay High Court in *Sudhir Lax*

(1) 15 E L R 425
(2) 16 E L R 151
(3) 14 E L R 432
(4) 16 E L R 108

Mandal v. Singh Dango (1) All these cases were considered by the Mysore High Court in *Anjaneya v. Ganga Reddi* (2) It is not necessary to discuss those cases to show as to how various High Courts tried to solve the difficult problem created by the amendment [illegible] in retaining the old sub-s (3) of the Act in the shape of sub-s (2) of s 100 after the amendment Suffice it to say that the Mysore High Court tried to give a meaning to cl (*b*) of sub-s (1) by including the case of an agent in the portion of the clause referring to any other person In that manner by putting a harmonious construction to the two clauses of sub-s (1) of s 100 the Mysore High Court summed up the result as follows

> To sum up though the result of the election is liable to be set aside because the corrupt practices committed by his agents are deemed to have been consented to by him he can avoid that result by establishing the requirements of s 100(2)

It was however added by the learned Judge who delivered that judgment that from the discussion from which he had come to that conclusion it was clear that it had not been a plain sailing for him and he remarked that it was possible to complain that these exercises in mental gymnastics could easily have been avoided if the draftsman had bestowed a little more care in drafting an important section like s 100 He further quoted from a judgment of DENNING L J in *Seaford Court Estates, Ltd v. Asher* (3) to justify that in case of such difficulty a Judge should ask himself the question

> If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done A Judge must not

(1) 17 E L R 378 (2) 21 E L R 247
(3) 1949 (2) K B 481

alter the material of which it is woven but he can and should iron out the creases

The mental gymnastics had to be committed in that case by the learned Judge because the creases in view of the faulty drafting had to be ironed out But I am fortunate in not being faced with that difficulty as the Legislature itself has by now ironed out the creases by proper legislation They have amended cl (d)(ii) of s 100 by Act 58 of 1958 by substituting in place of the words by a person other than that candidate or his election agent or a person acting with the consent of such candidate or election agent the words by an agent other than his election agent so as to give a meaning to the exception contained in sub s (2) of that section where the word agent has been used It cannot now be said that sub s (2) of s 100 has been returned by the amendment of 1956 in a fit of absent mindedness by the Legislature as a superfluous and meaningless piece of legislation nor is it necessary to strain the language of the statute in order to give a meaning to that provision assuming that the Legislature must be deemed to have kept a certain provision of law intact with some purpose The meaning of the statute as it now stands is clear Sub s (2) is now an exception to sub s (1) for the purpose of cl (d)(ii) of the latter sub section

Altogether, therefore I hold that issue no 3 is not material for the purpose of the case for even if it is decided that respondent no 2 was guilty of the corrupt practice referred to therein as it has not been asserted in the petition that he had committed that corrupt practice with the consent of the returned candidate respondent no 1 it cannot be taken into

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Sabyal J.

consideration for the purpose of deciding as to whether the election of respondent no 1 is void No evidence therefore shall be permitted in the case to be led in connection with issue no 3 under the proviso to s 87 of the Representation of the People Act

Ordered accordingly

APPELLATE CIVIL

*Before Mr Justice Mahesh Chandra**

BALMIKI SINGH (DEFENDANT APPELLANT)

v

MATHURA PRASAD AND OTHERS (PLAINTIFF RESPONDENT)

1958 November 21

Code of Civil Procedure, 1908 *O X r 1 and 2—Statement under—Difference between—O X r 2—Statement under—Statement made inadvertently by the counsel—Whether binding on the party—Court can consider the matter*

There is a clear difference between a statement under r 1 and one under r 2 of O X of the Code of Civil Procedure There is no limitation in r 2 that the questions must be limited to the allegations specifically made in the pleadings R 1 is confined only to ascertainment from the party—or his pleader R 2 provides for examination not only of the party or the pleader but also a companion of the party that is any person by whom a party or its counsel is accompanied The statement under r 2 of a person accompanying the party without any authority or power on his behalf cannot occupy the same position as the statement of the party or his pleader made under r 1 Admissions made by a party under r 1 are conclusive against him A statement under r 2 would be of great value and has to be considered in the decision of the case

The statement under O X r 2 does not stand on the same footing as the statement under O X r 1 and the question whether a particular statement made under O X r 2 would or would not bind the party concerned can be considered by the courts and when they come to the conclusion that the statement was made by the counsel inadvertently that statement made inadvertently could not be said to be binding on his clients

Second appeal no 949 of 1958 against the judgment and decree passed by R B KHANDELWAL Civil Judge Gonda dated October 18 1958 in Civil Appeal No 450 of 1957

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BALMIKI SINGH v. MATHURA PRASAD

Kanta Krishna and *Kailash Nath*, for the appellant

Ram Jee, for the respondent

MAHESH CHANDRA J. - This is a defendant's second appeal against the decree of both the Courts below

Mathura Prasad Shyam Lal and Dan Bahadur respondents instituted a suit against Balmiki Singh appellant for possession over plots nos 428/22 444/12 and 429/25 of village Kundru of district Gonda and recovery of Rs 60 as damages alleging that Ram Govind the father of respondent no 1 and grand father of respondents nos 2, and 3 was a sub tenant of the disputed plots and became an *adhivasi* on the enforcement of the U P Zamindari Abolition and Land Reforms Act 1950 They alleged that Ram Govind died subsequently and as his heirs the respondents became the *adhivasis* of the disputed plots and became *sirdars* thereafter on 30th October 1954 The appellant is said to have wrongfully cut away the crops of these plots causing a loss of Rs 65 to the respondents

The appellant contended that he himself was the *adhivasi* and had become *sirdar* of the disputed plots with effect from 30th October 1954 and that the suit was barred by limitation

The trial Court held that the respondents and not the appellant were the *adhivasis* and thereafter *sirdars* of the disputed plots that the suit was within time and that the respondents suffered damage to the extent of Rs 60 The suit was accordingly decreed The appeal was dismissed by the first appellate Court

The Courts below considered in detail the oral and documentary evidence produced by the parties In particular there was a difference in the extracts of *khasras* (Exs A 1 and A 2) relating to 1356 F and 1359 F respectively given by the *patwari* and filed by the appellant and certified copies of the same *khasras* (Exs 9 and 10)

issued from the Record Room In the certified copies (Exs 9 and 10) there was an entry in the name of Ram Govind the father of respondent No 1 and grandfather of respondents nos 2 and 3 as sub tenant of the disputed plots while in the copies given by the *patwari* and filed by the appellant there was no such entry The copies given by the *patwari* were obviously incorrect as found by the Courts below because we find that Ex A 2 purporting to be for 1359 F was really issued in 1358 F i e on 25th May 1957 No explanation has been offered by the *patwari* In respect of the entries in 1356 F also he had merely copied the entries of 1355 F The Courts below cannot therefore be said to have gone wrong when they held the certified copies issued from the Record Room to be correct and the extracts given by the *patwari* to be incorrect They also considered the oral evidence adduced by the parties and then came to the conclusion that the respondents and not the appellant had become the *adhivasi* and later on *sirdars* of the disputed plots

The only contention of the learned counsel for the appellant is that the respondents could not be in cultivatory possession of the disputed plots in 1359 F since their counsel himself stated on the date of issues that Ram Govind had died six years prior to his statement and this would place the death of Ram Govind prior to 1359 F This contention was considered by both the Courts below and they were of the view that the statement was made inadvertently by the learned counsel for the respondents on the date of issues and that respondent no 1 Mathura Prasad had specifically stated in the witness box that Ram Govind died 2½ or 3 years prior to the date on which the witness was making the statement Learned counsel for the appellant contends that the respondents are bound by the statement of their counsel For this he relies on *Abdul Aziz* v

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BALMUKI SINGH v. MATHURA PRASAD

M. Chandra J.

Mariam Bibi (1) *Rajunder Narain Rae* v *Bijai Govind Singh* (2) *and Nand Kishore* v *Ganesh Prasad* (3). On behalf of the respondents the contention is that the statement of the learned counsel for the respondents will not bind his clients as it was made inadvertently and also because the Court had no power to record that statement of his under O X on the date of issues and relied on *Manmohan Das* v *Mst Ramdei* (4) *Janki Prasad* v *Atku Lal* (5) *Suraj Mal* v *Mst Chhote* (6) and *Vasumal Valiram* v *Kavanchand Manghanmal* (7).

Before I consider the decisions relied upon by the learned counsel for the parties it would be useful if I look at the provisions of O X r 1 and O X r 2. O X r 1 runs as follows

> At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement if any of the opposite party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

It will be evident that this rule relates only to ascertainment by statements of the parties themselves or their pleaders whether allegations in the pleadings were admitted or denied by them. It will also be clear from rule 1 that this ascertainment is to be made by the Court only when the allegations are not expressly or by necessary implication admitted or denied by the party against whom they are made.

O X r 2 runs as follows

> At the first hearing of the suit or at any subsequent hearing any party appearing in person or

(1) I L R XLIX (1926) All 219
(2) 2 moore s Indian Appeals 258
(3) A I R 1929 All 446
(4) A I R 1951 P C 175
(5) 2 A L J 777
(6) A I R 1926 All 411
(7) A I R 1941 Sind 41

present in Court or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied may be examined orally by the Court and the Court may if it thinks fit put in the course of such examination questions suggested by either party

Evidently it does not relate merely to the allegations in the pleadings It provides for oral examination of the party or companion of the party able to answer any material questions relating to the suit There is no limitation in this rule that the questions must be limited to the allegations specifically made in the pleadings Even the phrase any material questions has only been used in connection with the ability of the companion of the party to answer it and the rules says that the party or such a companion may be examined orally by the Court I agree with the learned counsel for the respondents that this examination cannot take the place of evidence As held by their Lordships of the Judicial Committee in *Manmohan Das* v *Mst Ramdei* (1) the Court would go wrong if under this provision it chose to examine any person as a witness These provisions are not meant to take the place of O XVIII At the same time it would be incorrect to say that the oral examination by the Court would be limited to the admission or denial of the specific allegations in the pleadings Nor does the decision of their Lordships of the Privy Council lay down any such proposition

The two rules 1 and 2 of O X cannot stand on the same footing for another reason also R 1 is confined only to ascertainment from the party—or his pleader R 2 provides for examination not only of the party or the pleader but also a companion of the party that is any person by whom a party or its counsel is accompanied The statement of a person accompanying a party with

(1) A I R 1931 P C 175

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out any authority or power on his behalf cannot certainly occupy the same position as the statement of the party or his pleader made under r. 1. It has been repeatedly held that so far as the statement under O. X r. 1 is concerned admissions made by a party under this rule are conclusive against him. Such a statement is in the same position as written pleadings of the parties. A statement under r. 2 of O. X would certainly be of great value and has to be considered in the decision of the case but there is a clear difference between a statement under r. 1 and one under r. 2.

It is true that in this case the statement was made by the learned counsel for the plaintiffs and not by a mere companion of the party. The party was however entitled to show that the statement of the learned counsel was made inadvertently and did not represent the true state of affairs. Mathura Prasad (respondent no. 1) himself came into the witness box and stated on 4th November 1957 before the Munsif that his father Ram Govind died three years ago. In the Revenue Court Mathura Prasad (respondent no. 1) explained that his counsel had stated about the death of his father six years ago but it was really his (respondent no. 1's) brother who had died six years ago and that his father died in the year the *zamindari* was finished. He had also stated definitely that his father was in possession in 1356F. and 1359 F. and had died about 2½ or 3 years ago. The statement having been made on 28th April 1956 and the zamindari having been abolished by the issue of notification on 1st July 1952 it clearly means that Ram Govind died in the year 1952 and not six years before the statement of respondent 1's counsel on 1st August 1955. The same counsel Sri Mohammad Ayub who made the statement before the trial Court also argued the case before the trial Court and the first appellate Court and had evidently contended before them that his statement

had been made inadvertently There is no question of an amendment of an oral statement which had actually been made The learned counsel could only inform the Court about the mistake in his statement Respondent no 1 himself had certainly done so when after mentioning his counsel s statement he stated that his brother had died six years ago and that his father Ram Govind died in the year in which the *zamindari* was abolished The Courts below were then perfectly justified in considering whether or not the statement of the learned counsel for the respondents was made inadvertently After considering this aspect of the matter they came to the conclusion that the statement was actually made inadvertently and relied on the statement of respondent no 1 himself regarding the time of the death of his own father after considering the documentary evidence also

In *Abdul Aziz v Mariam Bibi* (1) this Court was considering a statement made under O X r 1 only and not under O X r 2 As mentioned already in the case of statement under O X r 1 it was an admission of the plaintiff s allegations in the pleadings and had to be taken as conclusive It was not a statement under O X r 2

In *Rajunder Narain Rae s* case (2) the question raised was about the mode in which the accounts were directed to be taken by the decree giving possession The case had been decided by the Provincial Court on 28th July 1809 and by the Sudder Dewanny Adawlut on 27th July 1812 It was on 18th December 1819 more than seven years after the decree of the Sudder Dewanny Adawlut that an order was made for taking an account of what the respondent had to receive with reference to one moiety or portion of the profits of the *zamindari* The calculations were made and the Vakil for the appel

(1) (1896) I L R XIX All 219 (2) 2 Moore s Indian Appeals 283

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hant had agreed in the name of client to the sum calculated as the *mesne* profits of the *zamindari*. It was in that connection that the Privy Council had held that the admission and consent of a Vakil made with due authority would bind his client and that where an order was made for the payment of a certain sum being the moiety of the profits of an estate founded on the amount for which security had been taken as the rental of the *zamindari* when possession was given up and that amount was admitted and assented to by the Vakil in Court and the order made accordingly. It was held that such a consent was binding on the client and precluded him from afterwards opening the account. That was the case of a consent and the Privy Council itself observed that their Lordships did not state that it was their opinion that the case might not be made out that the admission of the vakil was not made with due authority but in the case before them there was no doubt that he had the authority of his clients. This decision cannot therefore be interpreted to mean that courts are precluded from going into the question whether the statement can be said to have been and was actually made inadvertently without the authority of the client on the point particularly when it is not a case of a consent.

In *Nand Kishore's case* (1) it has only been decided that where an admission had been made by the lawyer of a party and the Subordinate Court had decided the case upon that admission it would not be correct to reopen the matter in appeal. In the present case both the Courts below had themselves considered the statement of the learned counsel for the respondent and far from deciding the case on the statement of the learned counsel for the respondents they considered that statement and the statement of respondent no. 1 himself and came to the conclusion that it was the statement of

(1) A I R 1929 All 446

respondent no 1 which disclosed the true state of affairs and that the statement of the learned counsel for the respondents was made inadvertently *Nand Kishore Rai's case* (1) also cannot, therefore, help the appellant

Janki Prasad v *Arku Lal* (2) dealt with s 118 of the old Civil Proccdure Code This was a case relied upon by learned counsel for the respondents for the proposition that the examination of the learned counsel for the respondent made in the trial Court was illegal This contention is without force in view of the specific wording of O X r 2 which permits examination not only of the party but also of his companion As mentioned also and as pointed out by their Lordships of the Privy Council in *Manmohan Das* (3) it was not for superseding the ordinary procedure of trial and take the place of O XVIII, but only to be used to obtain information on material questions The question about the time of death of Ram Govind was a material question and the Court could obtain information on that point But if the learned counsel for the respondents made a mistake while giving that information, respondent could show the correct state of affairs and also show that the statement of the counsel was made inadvertently The manner in which the mistake of the learned counsel was made could also be explained and on this point the Courts have, as already seen, found that the statement was inadvertently made

In *Suraj Mal* v *Mt Chhote* (4) this Court clearly held that a statement made under O X r 2 by a person appearing to prosecute a case or to look after it on behalf of the party is not necessarily binding on that party This would also show that the statement uned O X, r 2, does not stand on the same footing as the statement under O X r 1, and the question whether a particular

(1) A I R 1939 All 446
(2) 2 A L J 777
(3) A I R 1931 P C 175
(4) A I R 1926 All 411

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statement made under O X r 2 would or would not bind the party concerned can be considered by the Courts and when they come to the conclusion that the statement was made by the counsel inadvertently that statement made inadvertently could not be said to be binding on his clients

Vasumal Valiram's case (1) also can be authority for proposition that the Court is not entitled to examine a party or his counsel when he finds it necessary to obtain any information from such party on any material question All that it held is that it could not take the place of the procedure under O XVIII

It would, therefore, follow from an examination of the decisions cited by the learned counsel for the parties that it was open to the Courts below to ask the learned counsel for the parties under O X r 2 C P C about the time of the death of Ram Govind which was a material question The statement made was not a statement under O X r 1 C P C but only under O X, r 2, C P C and it was open to the Courts below to go into the question whether the statement of the learned counsel for the respondents was made inadvertently and whether the statement of respondent no 1 himself on that question was correct After having gone into that question and coming to a finding of fact the Courts could not be said to have been in error when they found that actually the respondents and their predecessor were in cultivatory possession in 1356 F and 1359 F The entry of actual possession in the *khasra* of 1356 F was also in favour of the respondents predecessor Ram Govind and not the appellant vide Ex A 1 So was the entry in 1359 F note Ex A 2

The appeal is accordingly without substance and is dismissed with costs

Appeal Dismissed

(1) A I R 1941 Sind 41

CIVIL MISCELLANEOUS

Before Mr Justice Pathak

1967

January 10

SHAMSHUDDIN SENIOR VICE PRESIDENT, MUNICIPAL BOARD, FARRUKHABAD (PETITIONER)

v

DR B N SAREEN AND OTHERS (RESPONDENTS)

U P Municipalities Act, 1916 *s 47 A(1)(a)—Resignation within computation of the period—Resignation when takes effect—Expressions of or from if make a difference*

Where a statute requires an act to be done within a specified period of a certain date the period commences from the date immediately next after the date The use of epressions from and of in the context bring about no real difference Under s 47 A(1)(a) the President is entitled to a clear period of three days immediately following the day on which he received the communication of the passing of the motion of no confidence

Resignation takes effect after it is accepted

Civil Miscellaneous Writ No 3622 of 1966

R N Bhalla, Sri Dhar and *S N Kacker*, for the Applicant

S C Khare K C Saxena and *P C Gupta*, for the Opposite parties

PATHAK, J —The first respondent Dr B N Sarin, was elected President of the Municipal Board Farrukhabad in December 1964 Sometime later about the middle of the year 1966 the petitioner Shamshuddin, was elected as Senior Vice President of the Board It appears that some of the members of the Board had lost confidence in Dr Sarin as President and in a meeting held on 9th September 1966, a motion of non confidence was passed

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The validity of the meeting was challenged by Dr Sarin by a petition under Art 226 of the Constitution filed on 12th September 1966 and an interim order was granted by this Court prohibiting the selection of a new President The petition was dismissed by DWIVEDI, J on 23rd November 1966

The result of the motion of non confidence was communicated to Dr Sarin on 9th September 1966 On 12th September 1966 he forwarded his resignation to the District Magistrate, Farrukhabad It seems that in the belief that the office of President had become vacant the petitioner assumed the office of President and commenced on 13th September 1966 to exercise the powers of that office One of the first acts in that capacity was to pass an order on the same date that the Board s office and Municipal Schools would remain closed on 14th September, 1966 in celebration of his assumption of office It appears that there was some misgiving in the Board on the question whether the petitioner could exercise the powers of the President of the Board Dr Sarin referred the matter to the District Magistrate who forwarded the reference to the State Government On 16th September 1966 the State Government sent a telegram to the District Magistrate advising that the outvoted President continued in office so long as the acceptance of his resignation by the Commissioner Allahabad, was not communicated to the Board Then on 20th September, 1966 the State Government issued notice to the petitioner charging him with improper conduct in the discharge of his duties and flagrant abuse of his position on the ground that he had passed the order of 13th September 1966 closing the Board s office and municipal schools on 14th September, 1966 when the Commissioner Allahabad had not yet communicated to the Board his acceptance of Dr Sarin s resignation as President The petitioner was directed to show cause why he should not

be removed from the office of Senior Vice President under sub-s (vii) and (viii) of cl (b) of sub s (2) of s 48 read with sub s (3) of s 55 of the U P Municipalities Act By the same notice he was informed that he was suspended by the Governor with immediate effect during the pendency of the inquiry against him

The petitioner now applies for *certiorari* and prohibition against the inquiry proceeding against him and also for *mandamus* directing the Commissioner to accept the resignation of Dr Sarin There is the further prayer that the petitioner should be permitted to function as acting President of the Board without any interference

The petitioner says that the office of the President had become vacant when he commenced to exercise the powers of that office and therefore there was no foundation for the charge framed against him His case rests on two submissions It is contended that Dr Sarin did not resign his office as President within three days of the receipt of the communication that the motion of non confidence had been passed and therefore by virtue of cl (*b*) of sub s (1) of s 47 A of the U P Municipalities Act he ceased to hold office of President on the expiry of three days after the receipt of such communication and thereupon a casual vacancy must be deemed to have occurred in the office of the President It is said that as the communication was received by Dr Sarin on 9th September 1966 the period of three days closed with 11th September, 1966 and no resignation having been made by Dr Sarin during that period he ceased to hold office on and from 12th September 1966 Accordingly, it is pointed out, the petitioner was entitled to exercise the powers of the President from that date and in making an order on 13th September, 1966 directing the Board s office and the municipal schools to remain closed on 14th September, 1966 he was not guilty of any

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improper conduct or of abuse of his position. The submission depends for its strength upon the question whether the period of three days concluded with 11th September 1966. It is clear that if it did the subsequent resignation by Dr. Sarin of his office as President could not preclude the operation of cl. (*b*) of sub-s. (1) of s. 47A. S. 47A provides:

> S. 47A. *Resignation of President on vote of no confidence*—
>
> (1) If a motion of non-confidence in the President has been passed by the Board and communicated to the President in accordance with the provisions of s. 87A, the President shall—
>
> (*a*) within three days of the receipt of such communication either resign his office or represent to the State Government to supersede the Board, stating his reasons therefor; and
>
> (*b*) unless he resigns under cl. (*a*), cease to hold office of President on the expiry of three days after the date of receipt of such communication and thereupon a casual vacancy shall be deemed to have occurred in the office of the President within the meaning of s. 44A:
>
> Provided that if a representation has been made in accordance with cl. (*a*) the Board shall not elect a President until an order has been made by the State Government under sub-s. (3).
>
> (2) [*Deleted*].
>
> (3) If a representation has been made in accordance with sub-s. (1) the State Government may after considering the same either supersede the Board for such period not exceeding the remainder of the term of the Board, as may be specified, or reject the representation.

Cl (*a*) of sub s (1) of s 47 A contemplates that the President shall resign his office within three days of the receipt of the communication that the Board has passed a motion of non confidence against him

When cl (*a*) speaks of the President resigning his office within three days it refers only to the act of the President drawing up his resignation in writing and handing it over to the District Magistrate under sub s (1) of section 47 which, as I shall presently show when considering the other submission of the petitioner, is attracted here It does not include within its scope all that is necessary to make the resignation effective in law It refers to a conscious act on the part of the President a deliberate choice out of the two alternatives offered him under cl (*a*) and embraces no more than what the President on his part is to do if he decides upon resignation He must deliver his written resignation to the District Magistrate within three days of receipt of the communication Upon the material before me, that was effected on 12th September 1966 The question is whether 12th September 1966 is within the period of three days of 9th September, 1966?

It seems to me that the principle is well settled that where the statute requires an act to be done within a specified period of a certain date the period commences from the date immediately next after that date In *Goldsmiths Co* v *West Metrop Ry* (1) the Court was called upon to decide whether the notice served by a company to treat for the purchase of lands was served in time The statute which gave the company power to take land which power was to cease after three years after the passing of the Act received the Royal assent on 9th August 1899 The Company served the notice on 9th August 1902 The Court held that the notice

(1) 1 K (1904) 1 K B 1

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was served in time. So also in *stewart* v. *Chapman* (1). A Special Bench of the Madras High Court *In re Court fees* (2) considered a notification reading that amendments do come into force from the date of publication in the *Gazette*. SCHWABE, C. J. and COUTTS TROTTER, J. formulated the rule for determining whether the named date from which the period was to be computed should be excluded in the computation. They pointed out that if the named date was the beginning of a definite limited period that is when there was a terminus *ad quem* as well as a terminus *a quo*, then *prima facie* the first day is excluded but if the named date was the beginning of an indefinite period then *prima facie* the first day is included. Applying that rule the named date, that is the date of receipt of the communication, being the beginning of a definite limited period, namely three days the named date must be excluded. In other words the date 9th September 1966 must be excluded and the period of three days commences with 10th September, 1966 and closes with 12th September 1966. This conclusion is fortified if reference is made to s. 9 of the U. P. General Clauses Act which declares that under any U. P. Act it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from. I see little distinction between the words from and of in the use to which they are put for the purpose of indicating the point of commencement of a period of time. It seems to me that where one speaks of the President being allowed three days from receipt of the communication or the President being allowed within three days of receipt of the communication to do a certain act there is no real difference. The same conclusion is reached from another approach. It is clear from cl. (*a*) of sub-s. (1) of s. 47-A that an option is open to the President either to resign his office or to represent to the State Government to supersede the Board and he is required

(1) L.R. (1961) 2 K.B. 799 (2) A.I.R. 1924 Mad. 257

to state his reasons therefor A period of three days has been allowed by the statute to enable the President to consider which of the two alternatives he will choose and having made his choice to exercise it If the interpretation suggested by the petitioner is accepted it could mean that in a case where the communication of the passing of the motion of non confidence is received by the President a few minutes before midnight of a certain day, then that date being included the period of three days would take into account an effective period of two days only to enable the President to consider his course of action and to act upon it That is so because the day upon which the communication was received would be considered as a complete day commencing from the midnight preceding, even though the communication was actually received only a few minutes before the midnight ending that day A day, as a general rule means a complete day, and it was recognised as long ago as *Clayton's case* (1) that the courts refused to take notice of all fractions and divisions of a day, for the uncertainty which is always the mother of confusion and contention Notice is taken of fractions of a day whenever it is necessary to decide which of two events first happened Upon that rule, having regard to the intention of the Legislature expressed in cl (*a*) of sub s (1) of s 47 A, it is apparent that the President is entitled to a clear period of three days immediately following the day on which he received the communication of the passing of the motion of non confidence The petitioner relies upon the observation of MEHROTRA, J in *Shambhu Dayal* v *U P Government, Lucknow* (2) to the effect that the three days are to start from the time of the communication of the resolution to the President Now the question before that learned Judge was merely whether the three days were to start from

(1) (1585) 5 Rep 1b (2) 1957 A I J 206

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the date when the communication was despatched by the Judicial Officer who presided over the meeting, which passed the motion of non confidence or from the date when the communication was effected S 47 A (1), which was considered by him contained language essentially different from that attracted to this case The question before MEHROTRA, J could not have arisen under s 47 A(1) as it stands today There is nothing in the judgment in that case which indicates that the learned Judge considered whether in the computation of the three days the day on which the communication was effected is to be included or excluded In my opinion, the observations in *Shambhu Dayal's case* (1) do not afford any guidance on the question under consideration On the contrary in *Ram Krishna Verma* v *State of U P* (2) G C MATHUR, J had occasion to consider the provisions of s 47 A as they stand at present In that case the motion of non confidence was passed by the Board on 13th June, 1966 and the result was communicated to the President on the same date The President handed over a representation purporting to be one under cl (*a*) of sub-s (1) of s 47 A on 16th June, 1966 The statute required that the representation should be made to the State Government and the learned Judge observed that if it could be deemed that delivery of the representation to the District Magistrate was equivalent to making a representation to the State Government then there could be no doubt that the representation was made within the prescribed period of three days

Upon the aforesaid considerations, I see no force in the first submission of the petitioner

The alternative submission of the petitioner is that as the resignation was forwarded by Dr Sarin to the District Magistrate on 12th September, 1966, he must be considered to have vacated his office as President on

(1) 1967 A L J 206 (2) 1966 A L J 1091

that date and therefore on 13th September 1966 the petitioner was competent to exercise the powers of the President Here again it seems to me that the petition must fail

It is necessary to examine the relevant provisions of the statute S 87 A(11) provides that a copy of the minutes of the meeting together with a copy of the motion of non confidence and the result of the voting thereon shall on the termination of the meeting be forwarded forthwith by the Judicial Officer to the President and the District Magistrate Then cl (*a*) of sub s (1) of s 47 A says that the President shall within three days of the receipt of the communication as required by s 87 A either resign his office or represent to the State Government to supersede the Board Sub s (1) of s 47 provides that the President wishing to resign may forward his written resignation through the District Magistrate to the State Government or the Prescribed Authority according as to whether he is President of the Board of a city or of any other Board Sub s (11 A) of s 87 A requires that as soon as may be after three days of the receipt of the copies mentioned in sub s (11) the District Magistrate shall forward the same to the State Government together in the event of the motion of non confidence having been carried with a report whether or not the President has forward his resignation in accordance with the provisions of ss 47 and 47 A It is apparent from this sub section that in the contemplation of the Legislature s 47 is called into play when the President resigns his office on receiving the communication that a motion of non confidence has been passed Now s 47 reads

> 47 *Resignation of President*—(1) A President of a Board wishing to resign may forward his written resignation through the District Magistrate—

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(a) where he is the President of the Board of a city to the State Government, and

(b) where he is the President of any other Board to the Prescribed Authority

(2) On receipt by the Board of information that the resignation has been accepted by the State Government or the Prescribed Authority as the case may be such President shall be deemed to have vacated his office '

It is contended by the respondents that when reference is made by sub s (11) of s 87 A the necessary inference is that both the sub sections of s 47 are intended to operate and that the office of President becomes vacant only when the acceptance of the resignation of the existing President is communicated to the Board Otherwise say the respondents there is no statutory provision indicating when the office becomes vacant in the event of a resignation under cl (a) of sub s (1) of s 47 A The petitioner on the contrary urges that it could never have been intended that a President in whom the Board had declared its loss of confidence should continue in office and therefore no question arose whether his resignation should or should not be accepted Consequently the argument goes on the provisions of sub s (2) of s 47 are not attracted

The law pertaining to the resignation of municipal functionaries and public officers can be summarised briefly At common law, the resignation of a municipal officer did not take effect so as to vacate a vacancy until such resignation was accepted by the proper authorities This rule was a necessary consequence of the principle that it was an offence for a number of a municipal corporation duly elected to a municipal office to refuse to serve The view has been expressed in England that *by the common law* it is the duty of every

person having the requisite qualification elected or ap pointed to a public municipal office to accept the same and that a refusal to accept such office is punishable (1) In respect of public officers the inclination of the com mon law and adopted as a principle of law by the Ame rican courts, is that to be effective the resignation must be accepted by competent authority (2) Without ac ceptance the resignation is nothing and the officer re mains in office In *Edwards v United States* (3) it was pointed out that at common law a public office was con sidered a burden which the appointee was bound to bear and that he could resign only when the appointing power consented This rule is so firmly recognised that it was held in one case *Com ex rel Wootton v Bern inger* (4) by the Supreme Court of Kentucky that even though a statute provided that all resignations of office shall be in writing and received and recorded by the court or officer required to fill the vacancy it does not operate to make a resignation effective when received and recorded or change the rule that it becomes effec tive when accepted The principle of the common law can however be superseded by statute and in England under the Local Government Act 1933 it has been dec lared that a person elected to office under that Act may resign that office by notice in writing signed by him and delivered to the clerk of the County Council the town clerk or such other authority as is designated and that the resignation takes effect upon the *receipt* of the notice by the person or body to whom it is required to be deli vered (5) Again at common law a resignation when complete creates a vacancy in the office and yet one finds in sub s (2) of s 47 of the U P Municipalities Act that the office of the President becomes vacant only upon

(1) 37 American Jurisprudence pp 864 (§ 235) 878 (§ 252),
(2) 43 American Jurisprudence p 25 (§167)
(3) 208 U S 471 26 L Ed 514 note 14
(4) 95 A L R 213 cited in 43 Amert can Jurisprudence p 24 (§ 167) foot
(5) 25 Hals (2nd Ed) p 446 § 836

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SHAMSH UDDIN v. DR. B N SARIN

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the receipt by the Board of information that the resignation has been accepted by the State Government or the Prescribed Authority The statute here appoints a stage lying even beyond the acceptance of the resignation

Now, reverting to the facts of the instant case it may be that as the President resigns upon a motion of non confidence being carried against him the necessity of acceptance does not arise and it may be possible to infer that sub s (2) of s 47 does not come into play But I need not express any opinion on the point in this case What seems clear to me is that even if it be taken that the resignation is completed and is effective merely by its communication to the authority to whom it is made, that event has not been proved to have occurred on September 12 1966 or even the next day The resignation had to be communicated to the State Government or the Prescribed Authority and in this case there is no dispute that it was to be communicated to the latter The District Magistrate is merely the channel through which the resignation is to be forwarded He is no more than that It is not the authority to whom the resignation is to be communicated The statute has appointed the Prescribed Authority to receive the resignation In the instant case the Commissioner of the Allahabad Division has been constituted the Prescribed Authority The resignation was received by the District Magistrate Farrukhabad at 4 o'clock in the afternoon of 12th September 1966 but there is no evidence or even any suggestion that it reached the Commissioner on that very day or even the next day The submission of the petitioner that the mere act of forwarding the resignation by Dr Sarin to the District Magistrate on 12th September 1966 made the resignation effective cannot be accepted There is no provision in the statute that the act of forwarding the resignation suffices to complete the resignation and make it effective in law I am unable

to draw that inference from the mere circumstance that sub s (1 A) of s 87 A requires the District Magistrate to report to the State Government whether the President has forwarded his resignation If the statute had in tended the act of forwarding the resignation to serve in law as completing the fact of resignation, it would have plainly said so Regard must be had to the cir cumstances that when the Legislature intended to give legal completeness to the resignation by an artificial standard it specifically enacted a declaration such as embodied in sub s (2) of s 47 I fail to find any com parable provision In my opinion it has not been es tablished by the petitioner that the resignation of Dr Sarin had matured into an act complete and effective in law, and the office of the President had been vacated, when the petitioner commenced to exercise the powers of that office and made the order of 13th September 1966

In the result therefore, this petition must fail

The petition is dismissed with costs The interim orders dated 27th September 1966 and 3rd October, 1966 are discharged

Petition dismissed

CIVIL MISCELLANEOUS

*Before Mr Justice G D Sahgal**

1967

January 20

HARI SHANKER SHARMA (PETITIONER)

v.

THE STATE OF U P (RESPONDENT)

U P Nagar Mahapalika Adhiniyam, 1959 *ss* 106 107 108 537(3) 577(f)—*Officiating or temporary appointments on the posts created under s* 106—*S* 108 *apply*—*S* 107 577(B) *and r* 15 *of the U P Nagar Mahapalika Sewa Niyamawali*, 1962 *do not apply to such appointments*—*Procedure under s* 107 *has to be followed in case of permanent appointments*

Alternative remedy—*right to get an order reviewed by the same authority*—*Relief under s* 537(3) *of U P Nagar Mahapalika Adhiniyam* 1959—*If alternative remedy*

S 108 of The U P Nagar Mahapalika Adhiniyam 1959 is independent of s 107 While s 107 relates to the permanent appointments to the posts s 108 relates to officiating and temporary appointments Cl (f) of s 577 does not deal with such appointments S 577(f) the Adhiniyam should be read along with ss 106 107 and 108 of the Adhiniyam and taking them as a whole it would appear that in case of servants of the Mahapalika who come over to it from the Municipal Board Improvement Trust Development Board or the local authority the procedure under s 107 has to be followed only in cases where they have to be appointed permanently to the new posts created under s 106 and not temporarily to which s 108 applies

Held as the petitioner was appointed temporarily on the post of Sahayak Nagar Adhikari s 108 of the Adhiniyam applied to him and not s 107 s 577(f) or r 15 of the U P Nagar Mahapalika Sewa Niyamawali 1962

The relief under s 537(3) of the Adhiniyam is only a discretionary relief given to the Mahapalika or any other person who may like to make any representation to get the order reviewed by the State Government A right to get an order reviewed by the same authority is not an absolute right but is a very limited right and it can not be said that it is a remedy alternative to one provided under Art 266 of the Constitution

*While sitting at Lucknow

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HARI SHANKER SHARMA v. THE STATE OF U P

Writ Petition No 729 of 1965 under Art 226 of the Constitution of India

The facts appear in the judgment

S D Misra, for the petitioner

Standing Counsel *J S Trivedi* for opposite party

Sahgal J

SAHGAL, J —This is a petition under Art 226 of the Constitution by one Hari Shanker Sharma against the State of Uttar Pradesh praying for the quashing of an order of the respondent contained in annexure 13 by issuing a writ of *certiorari* There is a further prayer to the effect that this Court be pleased to issue such other writ or direction as it may deem fit and necessary

By resolution no 126 passed on the 10th of January, 1965 the Nagar Mahapalika of Lucknow created under s 106(1) of the U P Nagar Mahapalika Adhiniyam (hereinafter to be described as the Adhiniyam) among other posts, a post of Sahayak Nagar Adhikari. Under sub s (1) of s 107 of the Adhiniyam appointment to this post can be made by the Nagar Pramukh after consultation with the State Public Service Commission in the manner prescribed and not otherwise S 108 of the Adhiniyam however, provides that notwithstanding anything contained in s 107, officiating and temporary appointments to such a post, may be made by the appointing authority without consulting the State Public Service Commission, but no such appointment shall continue beyond the period of one year nor shall be made where it is expected to last for more than a year, without consulting the State Public Service Commission The result was that when the post was created by the resolution on the 10th of January 1965 a letter (annexure 4) was addressed to the Public Service Commission Uttar Pradesh requesting that along with some other posts similarly created the Commission may advertise for the vacancy for this post In the meantime, however, the petitioner had been appointed to this post

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under s 108 by the Nagar Pramukh by the order dated the 16th of January, 1965 contained in annexure 1, and it was also pointed out to the State Public Service Commission that the present incumbent could also apply for the post if he felt that he fulfilled the necessary qualifications In fact, a number of posts was created by the resolution dated the 10th of January 1965 by the Nagar Mahapalika and it was with respect to all those posts that a reference was made to the Public Service Commission the post of the Sahayak Nagar Adhikari being one of them In all those posts temporary or officiating appointments had been made and the Commission was requested to advertise for all those posts and as for the persons who were occupying those posts, it was pointed out that those persons could also apply for those posts if they felt that they fulfilled the necessary qualifications We are, however not concerned with the other posts but are concerned only with the post of the Sahayak Nagar Adhikari The order making the appointments to those posts indicates that it was necessary to consult the State Public Service Commission for appointments to those posts under s 107 of the U P Nagar Mahapalika Adhiniyam, but for those posts officiating appointments were being made till the recommendation of the Public Service Commission was received for appointment

It would thus appear that after the creation of the posts on the 10th of January, 1965 the appointments were made to those posts including the appointment of the petitioner to the post of the Sahayak Nagar Adhikari by the Nagar Pramukh purporting to act under s 108 of the Adhiniyam It also appears to have been made clear in the letter, contained in annexure 4, dated the 17th of April 1965 which was sent to the Public Service Commission calling for their recommendation, that the present incumbents to those posts including the

petitioner to the post of Sahayak Nagar Adhikari also could make applications for their respective posts if they felt that they fulfilled the necessary qualifications making it plain that the appointments of those incumbents were only temporary or officiating

In pursuance of the order the petitioner began to work at the post When he was working on that post an order was received from the State Government contained in annexure 13 suspending the execution of the order among others of appointment of the petitioner to the post of Sahayak Nagar Adhikari The order of the Government is dated the 24th of November 1965 and reads as follows

> Whereas the Nagar Mahapalika Lucknow passed resolution no 126 dated January 10 1965 sanctioning the creation of posts in each service under section 106 of the U P Nagar Mahapalika Adhiniyam 1959 (U P Act No II of 1959) in accordance with sub para (3) of para 6 of the U P Nagar Mahapalika Services (Designations Scales of Pay Qualifications Conveyance Allowance and Method of Recruitment) Order 1963
>
> And whereas, the Nagar Pramukh and the Mukhya Nagar Adhikari who are the appointing authorities for posts mentioned in sub s (1) and (2) of s 107 of the said Adhiniyam respectively made temporary appointments in officiating capacities to the various posts created by the Mahapalika under the aforesaid resolution from amongst the existing employees of the Mahapalika by invoking the provisions of s 108 of the said Adhiniyam
>
> And whereas, it was incumbent on the aforesaid appointing authorities to adopt the procedure laid down in cl (*f*) of s 577 of the said Adhiniyam and r 15 of the U P Nagar Mahapalika Sewa Niyama-

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wali 1962 before making appointments of existing employees of the Mahapalika to the posts created under s. 106 of the said Adhiniyam.

And whereas the aforesaid appointing authorities failed to adopt the procedure laid down in cl. (f) of s. 577 and r. 15 of the U. P. Nagar Mahapalika Sewa Niyamawali 1962 while making appointments to the said posts;

And whereas the State Government is of the opinion that the marginally noted orders relating to appointments to the aforesaid posts made by the Nagar Pramukh and the Mukhya Nagar Adhikari are in contravention of the provisions of the said Adhiniyam and the Niyamawali;

1. Nagar Pramukh's order no. 6 dated 16th January 1965
2. Mukhya Nagar Adhikari's order no. 6 dated 17th January 1965
3. Mukhya Nagar Adhikari's order no. 12 dated 19th January 1965
4. Mukhya Nagar Adhikari's order no. 14 dated 21st January 1965
5. Mukhya Nagar Adhikari's order no. 15 dated 22nd January 1965
6. Mukhya Nagar Adhikari's order no. 17 dated 26th January 1965
7. Mukhya Nagar Adhikari's order no. 22 dated 11th February 1965
8. Mukhya Nagar Adhikari's order no. 23 dated 23rd February 1965

Now therefore in exercise of the powers under sub-s. (1) of s. 537 of the said Adhiniyam the Governor of Uttar Pradesh is pleased to suspend the execution of the said marginally noted orders issued by the Nagar Pramukh and the Mukhya Nagar Adhikari and all similar subsequent orders which might have been issued by them regarding appointments to the posts created by the Mahapalika under s. 106 of the said Adhiniyam in its resolution no. 126 dated January 10, 1965.

The Government seems to be of opinion that the Nagar Pramukh ought to have adopted the procedure laid down in cl. (f) of s. 577 of the Adhiniyam and r. 15 of the U. P. Nagar Mahapalika Sewa Niyamawali 1962, before making appointments of the existing employees

including the petitioner of the Mahapalika to the posts created under s 106 of the Adhiniyam and as this procedure had not been followed the appointment was not proper The order purports to have been passed under s 537(1) of the Adhiniyam

S 577 of the Adhiniyam in so far as it is relevant provides

> 577 Save as expressly provided by the provisions of this Chapter or by a notification issued under s 579—
>
> * * * *
>
> (e) all officers and servants in the employ of the said Municipality Improvement Trust Development Boar or local authority immediately before the appointed day shall, notwithstanding anything in ss 106 and 107 be officers and servants employed by the Mahapalika in a temporary capacity under this Act and for so long as they are not appointed to posts created under this Act they shall draw the same salaries and allowances and shall be subject to the same conditions of service to which they were entitled or were subject on the said day
>
> * * * *
>
> (f) the following procedure shall be adopted in appointing the officers and servants referred to in cl (e) to the posts created by the Mahapalika under s 106
>
> (1) appointments to posts for which consultation of the State Public Service Commission is necessary under s 107 shall be made according to the provisions of that section
>
> * * * *

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S 537(1) in so far as it is relevant provides that if the State Government is of opinion that the execution of any resolution or order of the Mahapalika or of any other Mahapalika authority is in contravention of or in excess of the powers conferred by this Act or of any other law for the time being in force or has been passed or made in abuse of any such power the State Government may by order in writing suspend the execution of such resolution or of order or prohibit the doing of any such act

It has, therefore to be seen as to whether there has been a violation of the provisions of s 577(f) of the Adhiniyam or r 15 of the Niyamavali making appointments among others of the petitioner to the post of the Sahayak Nagar Adhikari

It would be seen that on the creation of the Nagar Mahapalika the continuation of the appointments of the previous employees of the Municipality Improvement Trust Development Board or the Local Authority immediately before the creation of the Nagar Mahapalika was guaranteed as officers and servants employed by the Mahapalika in temporary capacity under the Act for so long as they were not appointed in accordance with the provisions of the Act They were to draw the same salaries and allowances and were subject to the same conditions of service to which they were entitled or subject to on the date of the creation of the Nagar Mahapalika, the Mahapalika being created on the 1st of February 1960 Cl (f) of s 577 lays down the procedure for the appointment of these officers and servants to the posts created by the Mahapalika under s 106 The Government seem to be of the opinion that as the petitioner was not an officer or servant of the erstwhile Municipal Board of Lucknow referred to in cl (e), he could not be appointed to any post created by the Mahapalika, except in accordance with the procedure pres

cribed under cl (*f*) of s 577 under which so far as the petitioner is concerned the post being one to which appointment had to be made in consultation with the State Public Service Commission without the consultation of the State Public Service Commission The contention on behalf of the petitioner however is that this relates to the appointment under s 107 of the Adhiniyam, i e, permanent appointment, and does not relate to an appointment under s 108 of the Adhiniyam under which the appointment of the petitioner had been made, pending permanent appointment which could be made only in consultation with the State Public Service Commission under s 107 The contention put forward by the petitioner appears to be correct S 577 cl (*e*), only guarantees the continuity of appointments of the employees of the Municipal Board Improvement Trust, Development Board or the local authority as the case may be before the creation of the Nagar Mahapalika on the same terms and conditions on which they were working Cl (*f*) provides that after the posts had been created by the Nagar Mahapalika they could be appointed to those posts only in accordance with the procedure prescribed A reference has been made to s 107 of the Adhiniyam which related to appointments to the posts that may be created by the Nagar Mahapalika under section 106 which provides for the appointment to those posts Section 108 is independent of s 107 While s 107 relates to the permanent appointments to the posts s 108 relates to officiating and temporary appointments Cl (*f*) of s 577 does not deal with such appointments It deals only as to how the employees who were already working before the creation of the Mahapalika can be absorbed in the posts created by the Mahapalika under s 106 The Mahapalika created a number of posts by its resolution dated the 10th of January 1965 It would have taken sometime before these posts could be permanently filled

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in in accordance with the procedure prescribed under s 107 In the meantime, the work had to be continued The appointing authorities of the Nagar Mahapalika, therefore, followed the procedure under s 108 by mak ing temporary and officiating appointments to those posts subject to the permanent appointments being made in consultation with the State Public Service Commis sion The petitioner had not been appointed to the post permanently under s 107 of the Adhiniyam Cl (f) of s 577 deals with appointments under s 107 of the Adhiniyam His appointment being officiating is not hit by that clause It is subject to all the limitations of s 108 of the Adhiniyam, i e, the appointment cannot last for more than a year S 577(f) of the Adhiniyam should be read along with ss 106, 107 and 108 of the Adhiniyam and taking them as a whole it would appear that in case of servants of the Mahapalika who come over to it from the Municipal Board Improvement Trust, Development Board or the local authority the procedure under s 107 has to be followed only in cases where they have to be appointed permanently to the new posts created under s 106 and not temporarily to which s 108 applies As the petitioner was appointed tem porarily, s 108 applied to him and not s 107 or s 577(f) The appointment of the petitioner, therefore was pro per and the State Government had no power to suspend the execution of the order of appointment of the peti tioner under s 537 of the Adhiniyam

As to the violation of r 15 of the Niyamavali refer red to in the order of the Government this rule is in no way inconsistent with the conclusions arrived at above It only provides that where consultation of the Commission is necessary under the Act before making appointment of any servant referred to in cl (e) of s 577 to any post created under the Act a reference shall before making such appointments be made by

the Mukhya Nagar Adhikari to the Commission to determine the suitability of the candidate. This rule also only applies to cases of permanent appointment contemplated under s. 107 of the Adhiniyam and not to those made under s. 108.

The learned Senior Standing Counsel appearing on behalf of the respondent opposed the petition on four grounds.

He pointed out that the post being permanent the appointment could not but be one to which s. 107 applied and not s. 108. It is not possible to accept this argument. The post may be permanent but still till the appointment is made to that post on a permanent basis it may be necessary to appoint some one to carry on the current duties of that post. In such circumstances there is no bar to a temporary or officiating appointment being made to that post which would be subject to the limitations contained in s. 108.

Then it was urged that if two views are possible as to the interpretation of a certain provision and one view has been taken by the Government there can be no interference under Art. 226 of the Constitution by this Court. I am however of opinion that two views are not possible in the matter on the principle of the harmonious construction of the various provisions of the statute and this point therefore, also cannot be of any help to the respondent.

It was then urged that there was an alternative remedy available to the petitioner inasmuch as the petitioner could approach the State Government under s. 537(3) for the revoking of the impugned order. Under s. 537(3) it is provided that the State Government may at any time on representation by the Mahapalika or otherwise revise, modify or revoke an order passed under sub-s. (1). This provision gives power to the

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State Government to revise modify or revoke its order on the representation made to it But this is only a discretionary relief given to the Mahapalika or any other person who may like to make any representation to get the order reviewed by the State Government A right to get an order reviewed by the same authority is not an absolute right but is a very limited right and it cannot be said that it is a remedy alternative to the one provided under Art 226 of the Constitution

It was then urged that the appointment of the petitioner was for an indefinite period, no period being limited to the order of appointment, though under s 108 the appointment could not be continued beyond the period of one year The appointment being temporary, it could not continue beyond one year in view of the provisions of s 108 of the Adhiniyam But that does not mean that the appointment was bad and so it should be cancelled

Altogether, therefore, the petition should be allowed and the order contained in annexure 13 quashed That will, however not mean that the appointment would continue even beyond the terms of s 108 of the Adhiniyam It being an appointment under s 108 it shall conform to the requirements of that provision

The petition is accordingly allowed with costs and the order contained in annexure 13 quashed

Petition allowed

APPELLATE CIVIL

Before Mr Beg, the Chief Justice and Mr Justice Dwivedi

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January 28

SRI GOPAL BEHARI KAPOOR (APPELLANT)

v

DISTRICT MAGISTRATE ETAH AND OTHERS (RESPONDENTS)

Code of Civil Procedure, *Act V of* 1908 *s* 104 *O XXXIX r* 4 *and O XLIII r* 1(*r*)—*Discharge of interim order—If appealable under O XLIII r* 1(*r*)—*S* 104 *if applies to appeal from an Order of Single Judge of the High Court to Division Bench—Order granting or vacating an interim order in Writ—If appealable*

A perusal of the various provisions relating to appeals from decrees and orders indicates that the appeals envisaged in the Code of Civil Procedure are appeals from a lower court to higher court and not from one judge of a court to another judge of the same court The judgment of a single judge of the High Court constitutes the judgment of the High Court Therefore s 104 has no application to order passed by a single judge and no appeal would lie under O XLIII r 1(*r*) against such an order

Order granting or vacating an interim order in a pending writ petition does not amount to a judgment and is therefore not appealable under cl 10 of the **Letters** Patent

First Appeal from Order No 413 of 1966 against the order of S CHANDRA, J dated 9th December 1966 in C Misc Writ No 3736 of 1966

A P Misra, for the Appellant

The following judgment of the court was delivered by—

BEG, C J —This is an appeal under O XLIII, r 1(*r*) of the Code of Civil Procedure by Sri Gopal Behari Kapoor President Kasganj Municipal Board district Etah The appellant in this appeal Sri Gopal Behari Kapoor, had filed a writ petition in this Court being

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Writ Petition No 3736 of 1966 Respondent no 1 in the writ petition was the District Magistrate Etah, respondent no 2 was Sri L R Lahri Civil Judge Etah and respondents nos 3 to 20 were members of the Municipal Board Kasganj The case of the petitioner as set out in the writ petition was that the meeting of the Municipal Board of which he was the President was scheduled to be held on the 17th of October 1966 for consideration of a no confidence motion against him The requisition for the aforesaid meeting purported to bear the signature of Sri Ram Singh a member of the Board The meeting was going to be presided over by Sri L R Lahri Civil Judge Etah who according to the petitioner was not a properly appointed judicial officer The main relief claimed by the petitioner in the said writ petition was that a writ be issued directing the District Magistrate Etah not to convene the meeting to be held for the purpose of considering the no confidence motion against the petitioner without deciding the question whether the requisition was signed by Sri Ram Singh or not The petitioner by means of a separate application prayed for an interim order directing the respondents not to hold the proposed meeting This writ petition was admitted by a Bench of this Court on the 4th of October 1966 on which date the said Bench passed the following order

> Issue notice The meeting fixed for the 17th of October 1966 on the basis of the notice dated the 14th of September 1966 shall not be held until further orders of this Court'

The application for interim relief came up for hearing on the 14th of October 1966 before ASTHANA J who passed the following order on that application

> Heard learned counsel for the parties One of the points raised in this application is that the Presiding Officer who has been appointed by the Dis-

trict Magistrate to preside at the meeting is not competent to preside at that meeting There is also a dispute about the signature of one of the members to the requisition for calling a meeting of no-confidence I think in these circumstances the proper order would be to allow the meeting to be held on the 17th of October 1966 as scheduled Let the meeting be held on that date Till further orders of this Court the Presiding Officer shall not send a copy of the minutes of the meeting together with the copy of the motion and the result of the voting thereon to the District Magistrate and to the President

The writ petition came up for hearing before SATISH CHANDRA, J on the 9th of December 1966 On that date the petition could not be heard but the learned Judge passed an order the relevant portion of which runs as follows

> I have heard learned counsel Since the hearing cannot proceed today in my opinion this is not a fit case for the continuance of the stay order granted on the 14th of October 1966 That order is therefore vacated

Dissatisfied with the said order Sri Gopal Behari Kapoor, the petitioner filed the present appeal in this Court on the 24th of December 1966 under O XLIII r 1(r) C P C This appeal was fixed for admission before us today

We are of opinion that this appeal deserves to be dismissed summarily on the preliminary ground that it is not maintainable As the learned counsel for the appellant stated before us that a number of similar appeals have been admitted by other Benches in this Court, we propose to give reasons in support of our view in some detail It has been urged that the order passed

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by the learned single Judge vacating the interim order was an order under O XXXIX r 4 C P C and an appeal against that order was provided for under cl (r) of O XLIII r 1 C P C It has been stressed that proceedings under Art 226 of the Constitution are civil proceedings and will be governed by the Code of Civil Procedure Reference is made to s 117 of the Code of Civil Procedure which says that save as provided in Part IX or Part X or in the rules, the provisions of the Code shall apply to High Courts In this connection a reference is also made to s 120 of the Code of Civil Procedure and it is urged that O XXXIX and O XLIII are not excluded by the said provision and are therefore applicable to a High Court exercising its original civil jurisdiction under Art 226 of the Constitution

Having given our consideration to this argument we find it difficult to accept it S 96 of the Code of Civil Procedure provides for appeals from original decrees S 104 of the Code of Civil Procedure provides for appeals from orders The particular orders against which an appeal lies under the Code of Civil Procedure are specified in O XLIII r 1 of the Code of Civil Procedure A perusal of the various provisions relating to appeals from decrees and appeals from orders would indicate that the appeals envisaged in the Code of Civil Procedure are appeals from a lower court to a higher court, and not from one Judge of a court to another Judge of the same Court The judgment or order of a Judge of the High Court is an order of the High Court An order of a single Judge of the High Court is no less an order of the High Court than an order of a Bench or a Full Bench of the High Court No doubt there are provisions for appeals from the order of a single Judge to a Division Bench The provisions for such appeals are however to be found not in the Code of Civil Procedure but in cl 10 of the Letters Patent or in Chap VIII r 5 of the Rules of this Court These

appeals are not controlled by the provisions contained in the Code of Civil Procedure An express provisions is made in s 4(1) of the Code of Civil Procedure, 1908 clarifying the position that nothing in the said Code shall be deemed to limit or otherwise affect any special or local law in force or any special jurisdiction conferred The law contained in the Letters Patent and Chap VIII, r 5 of the Rules of this Court would come under the category of special law and would, therefore, not be affected by the provisions of the Code The present appeal is neither a Letters Patent appeal nor a special appeal under Chap VIII r 5 of the Rules of this Court It is an appeal under O XLIII r 1(*r*) of the Code of Civil Procedure Applying the principles enunciated above to the present case it cannot be held to be maintainable

A reference to the case law on the point would support the same view In the case of *Mohd Sharif* v *Union of India* (1) a learned single Judge had vacated an interim injunction in a pending second appeal A special appeal was filed, and it was contended before a Bench of this Court that the order of the single Judge was appealable under O XLIII The reply of the Bench to the question as to why such an order should not be appealable is contained in the following observation in the judgment

> The simple answer is that Order 43 of the Code is not applicable to orders passed by the High Court

In the case of *Lalji Tandon* v *Sripat Rai* (2) a Division Bench of this Court held that s 104 of the Civil Procedure Code contemplates appeals from one Court to the Court to which appeals are preferred from its

(1) A I R 1961 All 92 (2) A I R 1958 All 105

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decrees The Code of Civil Procedure does not contemplate an appeal from an order of a Single Judge of the High Court to another Bench of the same Court

Similarly in *Vishnu Pratap* v *Smt Revati Devi* (1) a Division Bench observed as follows

> It is true that Os XL and XLIII both apply to the High Court but the question here is whether O XLIII makes provision for an appeal from one court to another or it is intended to cover cases of an appeal from one Judge to a bench of the same Court Part VII, C P C deals with appeals and s 96 provides that an appeal against a decree passed by a Court shall lie to a Court authorised to hear appeals from the decisions of such Court Clearly s 96 contemplates two separate courts, one being authorised to hear appeals from a decree passed by the other While s 96 deals with original decree s 104 C P C deals with orders not being decrees and the orders that are appealable are set out under O XLIII C P C The question of an appeal from one Court to another Court is no doubt governed by the provisions of the Code of Civil Procedure but the provisions for appeal from one Judge of a Court to a bench of the same court is not provided for by the Code and must be governed by the Letters Patent

The Bench noted that Mr Woodroffe in the course of his arguments before a Full Bench of the Calcutta High Court in *Toolsee Money Dassee* v *Sudevi Dasee* (2) urged

> A Judge exercising the original civil jurisdiction of the High Court is not subordinate to the High Court he is the High Court No appeal

(1) A I R 1933 All 647 (2) I L R (1899) XXVI Cal 861

> lies or can lie, under the Civil Procedure Code from the decree or order of the High Court in the exercise of its original civil jurisdiction, the appeal is by virtue of cl 15 of the Letters Patent

and this argument was accepted by the Full Bench which held that such appeals were governed by the Letters Patent and not by s 588 (which is equivalent to s 104, C P C)

JENKINS C J speaking for the Division Bench of the Calcutta High Court in *Debendra Nath Das* v *Bibudhendra Mansingh* (1) observed

> A Judge of a High Court sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court

He held that this is a true result of the Letters Patent and the Code of the Civil Procedure, for the Code makes no provision for an appeal within the High Court, that is to say, from a Single Judge of the High Court This right of appeal depends on cl 15 of the Charter

A Division Bench of the Rangoon High Court consisting of ROBERTS, C J and LEACH, J held in *Hajee S Shakul Hamid* v *K N Mohamed Ibrahim* (2) that s 96 C P C does not apply to appeals from decrees by a High Court in exercise of its original jurisdiction, but only provides for appeals from other Courts exercising original jurisdiction The original side of a High Court is just as much the High Court as the appellate side and rights of appeals are given not by the Civil Procedure Code but by cl 13 of the Letters Patent

(1) A I R 1916 Cal 978 (2) A I R 1937 Rangoon 268

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Similar view was expressed by the Madras High Court in *Sabhapathi Chetti* v *Narayanasami Chetti* (1) It was held that the provision made by cl 15 of the Letters Patent for appeals from one or more Judges of the High Court to other Judges of the same court is entirely foreign to the provisions of the Civil Procedure Code relating to appeals from one Court to another

The Bombay High Court has also taken the same view Dealing with the effect of s 117, C P C, HAYWARD, J in *Bhuta Jayatsingh v Lakadu Dhansingh* (2) observed

> 'It appears to me to follow that the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent, while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the civil courts of the mofussil subject to the High Court would be the Civil Procedure Code

He further observed

> It appears to me, therefore upon these considerations and authorities including that of the Privy Council that the civil appellate jurisdiction over civil courts subordinate to the High Court was alone in view when the Civil Procedure Codes were, by s 632 of the Codes of 1877 and 1882 and by s 117 of the present Code, made applicable to the Chartered High Courts by the Indian Legislature

In the same case SCOTT, C J observed

> In my opinion s 98 like s 104, read with O XLIII, r 1 must be taken to apply to appeals from Courts of inferior jurisdiction to the High

(1) I L R (1902) 26 Mad 443 (2) A I R 1919 Bom 1

Court, and not to appeals from one or more Judges of the High Court

This Full Bench decision was followed subsequently by the Bombay High Court in *Vaman Ravji* v *Nagesh Vishnu* (1)

The Lahore High Court has also taken the same view in *Ruldu Singh* v *Sanwal Singh* (2)

On a parity of reasoning s 96 which provides for an appeal, would not apply to decrees passed by the High Courts No appeal could, therefore lie from a decree of a Single Judge of the High Court under s 96 S 104 similarly will not be attracted when a party is aggrieved by an order passed by a Single Judge of a High Court

The historical development of the law on the subject also includes that s 104 C P C does not apply to orders passed by a Single Judge of the High Court, or otherwise affect the appeals that may lie under the Letters Patent Under the Code of Civil Procedure of 1877 a right of appeal was conferred by s 588 from certain specified orders, and from no other orders The Code of 1877 was replaced by the Code of 1882 but the provisions relating to orders were re enacted in the same terms

The Bombay and Madras High Courts held that an appeal from an order passed by a Single Judge of High Court lies only in accordance with s 588 and not other wise A Full Bench of the Bombay High Court in *Sonbai* v *Ahmedbhai Habibhai* (3) held that cl 15 of the Letters Patent and the Rules of the High Court, have to be read in the light of the provisions of s 363, C P C, under which an appeal to the High Court from an interlocutory order made by one of the Judges

(1) A I R 1940 Bom 216 (2) A I R 1922 Lah 990
(3) 9 Bom H C R 998

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lies only in those cases in which an appeal is allowed under the Code of Civil Procedure The Madras High Court took the same view in *Rajagopal in re* (1) The Privy Council overruled this view point It held in *Harish Chunder Chowdry* v *Kali Sundari Debia* (2) as follows

> It only remains to observe that their Lordships do not think that s 588 of Act X of 1877 which has the effect of restricting certain appeals applies to such a case as this where the appeal is from one of the Judges of the Court to the Full Court

After this decision of the Privy Council the High Courts of Calcutta Bombay and Madras held that an order not appealable under s 588 C P C may still be appealable provided it amounted to a judgment within the meaning of cl 15 of the Letters Patent, vide *Chappan* v *Moidin Kutti* (3) *Subhapatti Cheetti* v *Narayanasami Chetti* (4) *Toolsee Money Dassee* v *Sudevi Dassee* (5) and *Secretary of State* v *Jehangir* (6)

But the Allahabad High Court in *Banno Bibi* v *Mehdi Husain* (7) expressed a contrary view SIR JOHN EDGE, C J observed

> If the order was not appealable under s 588 and s 591 of the Civil Procedure Code it could not be appealed against under the Letters Patent of the High Court

This view was affirmed by a Full Bench of this Court in *Muhammad Naim Ullah Khan* v *Ihsan ul lah Khan* (8)

The Supreme Court in *Union of India* v *Mohindra Supply Co* (9) has pointed out that in this state of affairs the Legislature intervened While enacting the

(1) (1886) I L R 9 Mad 447
(2) I L R (1889) 22 Mad 63
(3) (1895) I L R XXVI Cal 461
(7) I L R (1889) XI All 378
(9) 1962 A L J (S C) 3
(4) 10 I A p 4 at 17
(4) I L R (1902) 25 Mad 555
(6) 4 Bom L R 342
(8) I L R (1892) XIV All 296

Code of 1908 the Legislature incorporated s 4 and enacted in s 104(1) that an appeal shall lie from the orders set out therein and save as otherwise expressly provided in the body of the Code or by any law for the time being in force , from no other orders The Supreme Court observed (at page 7)

> The intention of the Legislature in enacting sub s (1) of s 104 is clear the right to appeal conferred by any other law for the time being in force is expressly preserved This intention is emphasised by s 4 which provides that in the absence of any specific provision to the contrary nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force The right to appeal against judgments (which did not amount to decrees) under the Letters Patent, was therefore not affected by s 104(1), C P C 1908

SHAH, J speaking for the Supreme Court further observed

> Under the Code as amended, the view has consistently been taken that interlocutory judgments (i e decisions though not amounting to decrees which affect the merits of the questions between the parties by determining some right or liability) passed by Single Judges of Chartered High Courts were appealable under the Letters Patent *Ruldu Singh* v *Sanwal Singh* (1), *Paramasivan* v *Ramasami* (2) *Vaman Ravji Kulkarni* v *Nagesh Vishnu Joshi* (3) and *Ram Sarup* v *Kaniz Ummehani* (4)

In spite of the changes incorporated by the Legislature in the Civil Procedure Code of 1908 this Court for a

(1) I L R (1932) 8 Lah 168
(2) I L R (1939) Bom 496
(3) I L R (1933) 56 Mad 915
(4) I L R (1937) All 866=1936 A L J 1226

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while continued to stick to its earlier opinion expressed in the Full Bench case of *Muhammad Naim Ullah Khan* (1) The Full Bench decision was followed in *Piare Lal* v *Madan Lal* (2) This decision of this Court came up for consideration before a Division Bench consisting of SULAIMAN, C J and BENNET, J in *L Ram Sarup* v *Mst Kaniz Ummehani* (3) The Bench held that the opinion expressed by the Division Bench in *Piare Lal's* case (2) has not been followed by the other High Courts, and that it was no longer necessary to refer it to a Full Bench because of changes in the law This Division Bench case brought the view point of the Allahabad High Court in line with the other High Courts The decision of SULAIMAN, C J was affirmed by another Division Bench of this Court in *Dhoom Chand Jain* v *Chaman Lal Gupta* (4) where M C DESAI, C J and S N DWIVEDI, J held that *Piare Lal's* case (2) was no longer good law because it did not consider the effect of s 4 introduced in the Code of 1908 They also held that *Piare Lal's* (2) decision must be held impliedly overruled by the Supreme Court in the *Union of India* v *Mohindra Supply Co* (5)

The question of the applicability of s 104 has thus become well settled both negatively and positively S 104 does not control the appeals that lie under the Letters Patent Sub s (2) of s 104 which provides that no further appeal will lie against an order deciding an appeal under that section, does not apply to orders passed by the High Court and does not preclude a further appeal under the Letters Patent That is because s 104(1) specifically preserves any law for the time being in force which includes the Letters Patent On the other hand s 104 does not apply to orders passed by the Single Judges of the High Court,

(1) I L R (1892) XIV All 226
(2) I L R (1939) All 191
(3) A I R 1937 All 165
(4) 1962 A L J 789
(5) 1962 A L J (S C) 1

because a right of appeal against such orders has been dealt with by the Letters Patent, the operation whereof is expressly saved by s 4 of the Code of Civil Procedure which says that nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred by any other law S 104 or O XLIII C P C cannot, therefore, either limit or otherwise affect or confer, a right of appeal from an order of the Single Judge of a High Court to a Division Bench of the same Court This special jurisdiction is not conferred or dealt with by the Code of Civil Procedure, but by the Letters Patent alone

Even if the present appeal is treated to be either under cl 10 of the Letters Patent or under Chap VIII, r 5 of the Rules of Court, it will be incompetent An appeal under these provisions lies against a judgment It has been held in *Sri Iftikar Husain* v *Sri Sharafat Ullah* (1) decided by a Division Bench consisting of M C DESAI, C J and B D GUPTA, J that

> ' An application for an interim order of stay is not based on a right evidently it cannot be based on a right which itself is under investigation in the main case It is rather based on a ground of expediency, the object behind it being to preserve certain state of affairs in which the final order to be passed in the case may operate to the fullest advantage No one can claim to have a right to a particular stay order Therefore, an order granting or refusing an interim order of stay does not decide any question of right and does not amount to a judgment

The Division Bench distinguished the Full Bench case of *Glass Beads Factory* v *Shri Dhar* (2) as not being

(1) Special Appeal no 638 of 1960decided on 20th Dec 1961
(2) 1960 A L J R 887

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applicable to a case where an interim order is passed or is vacated in a pending writ petition It is to be noted that in *Glass Beads Factory* case (1) the order sought to be appealed against under cl 10 of the Letters Patent was an order dismissing the appeal against an order granting injunction The order, therefore was not an interlocutory order passed in the main case, but an order that itself finally disposed of the entire case in the High Court The decision of the Division Bench in *Iftikar Husain's* case (2) was followed by another Division Bench consisting of V BHARGAVA and G C. MATHUR, JJ in *Sri Ratan Lal Gupta* v *Ulfat Rai Jain's* case (3) We are in agreement with these decisions It is therefore, the settled view of this Court that an order granting or vacating an interim order in a pending writ petition does not amount to a judgment and is, therefore, not appealable under cl 10 of the Letters Patent or under Chap VIII r 5 of the Rules of Court

In either view of the case, the present appeal is not maintainable

The net result of the above discussion is that from whichever aspect the matter is viewed, the present appeal must be held to be not maintainable

This appeal is accordingly incompetent and is dismissed summarily

Appeal dismissed

(1) 1960 A L J R 387 (2) Spl App No 628 of 1960 decd on 26th Feb 1961
(3) Spl App No 616 of 1963 decided on 12th Nov 1963

CRIMINAL MISCELLANEOUS

Before Mr Justice Mahesh Chandra and
Mr Justice Gangeshwar Prasad

1961
March 16

RAM MANOHAR LOHIA
AND OTHERS PETITIONERS,

v

STATE OF U P AND OTHERS OPPOSITE PARTIES

Code of Criminal Procedure, *(Act V of)* 1898 *ss* 144 *and* 188—*Constitution of India* (1950) *Arts* 19 *and* 141—*Provisions of ss* 144 *and* 188 *of the Code, whether un constitutional—Binding effect of the law declared by the Supreme Court*

The Supreme Court decision in *Babu Lal Parate* v *State of Maharashtra* (1) and other cases not only cover the point that s 144 of the Code of Criminal Procedure in view of the wide amplitude of the power it confers on certain Magis trates does not impose unreasonable restrictions on certain fundamental rights so as to render it unconstitutional and void but also saves the constitutionality of the portions thereof relating to the assumption and exercise of power in respect of public tranquillity which though not synonymous with is included within the expression and import of public order provided for by Art 19 of the Constitution

Even if it be possible to contend—which is not accepted—that the latter portion of the law stated above was not speci fically raised before or directly and necessarily decided by the Supreme Court it would nonetheless be binding on all the Courts in India as clearly laid down by Art 141 of the Constitution

The provisions of s 188 are constitutional and cannot be held to be *ultra vires* There is no inconsistency between the provisions of ss 144 and 188 of the Code and if there be some it cannot render the latter unconstitutional It is true that s 188 requires for punishability acts like riot or affray which are not covered by Art 19 of the Constitution but those acts are in addition to the violation of an order under s 144 which is constitutionally sufficient for the purpose of the liability and as such only militate against the rigour of the permissible range of punishment

(1) A I R 1961 (S C) 884

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Gangeshwar Prasad J

Quaere —Whether portions of s 144 of the Code of Criminal Procedure which relate to riot affray etc are constitutional ?

Criminal Miscellaneous Case No 2120 of 1966

S N Kacker, R C Srivastava and *R Pandey*, Advocates and *Dr Ram Manohar Lohia* (in person) for the applicant

J R Bhatt, for the opposite parties

GANGESHWAR PRASAD, J —This is a petition for a writ of *habeas corpus* by seven persons who were confined as undertrial prisoners in the District Jail of Agra at the time of making the petition Petitioner no 1 is Dr Ram Manohar Lohia who is a member of the Lok Sabha petitioner no 2 is Sri Braj Raj Singh who, according to the petition is an old worker of the Samyukt Socialist Party and who was a member of the Lok Sabha from 1957 to 1962 petitioner no 3 is Sri Baloji Agarwal who is a member of the Uttar Pradesh Vidhan Sabha from the Agra City Constituency and the remaining petitioners are Sri Hukum Singh Parihar Sri Ram Sanehi Lal Yadava, Sri Kitab Singh Yadava and Sri Ganga Prasad Sharma who according to the petition are active workers of the Samyukt Socialist Party The opposite parties to the petition are the State of Uttar Pradesh, Sri Ravi Shanker Johri District Magistrate Agra, and Sri K C Seth Additional District Magistrate (Judicial) Agra

The facts which led upto the petition are briefly as follows. Some political parties including the Samyukt Socialist Party were trying to organise U P Bandh on 12th July 1966 In view of this situation, opposite party no 2, the District Magistrate of Agra acting under s 144 Cr P C passed an order the relevant portions of which are as follows —

To—The General Public residing or frequenting Agra District—

Whereas information has been received that in connection with U P Bund Agitation there is likelihood of some sections of the Public indulging in violation and lawlessness to force the closure of shops, offices, etc and thereby causing breach of the peace and

Whereas immediate prevention and speedy remedy is desirable for maintaining public peace and tranquillity,

Now, therefore, in exercise of the powers under s 144 of the Code of Criminal Procedure, 1898 I, R S Johri, District Magistrate, Agra hereby order as follows —

(i) No procession or demonstration of any kind shall be organised or taken out anywhere in the district without a special permit from me or from the Sub-Divisional Magistrate concerned or the Superintendent of Police Agra

(ii) No assembly of five or more persons shall gather together at any public place Any such assembly shall be deemed to be unlawful and shall be liable to be dispersed by necessary force without further warning if it does not disperse upon command by a Magistrate or an officer in charge of the Police Station

Exception—This prohibition does not apply to *bona fide* religious assemblies at places of worship like temple mosque *gurdwara*, church, etc

(iii)

(iv)

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(v)

(vi) No person shall indulge in any inflamatory speech as may likely to cause a disturbance of the public peace

(vii)

(viii) No person shall shout or make use of any slogans in public street of public places likely to cause a breach of the peace

(ix) This order shall come into force at once and shall remain in force for a period of 15 days unless withdrawn earlier

(x) This order is passed *ex parte* in view of the emergency

(xi) This order shall apply to the limits of Agra District

(xii) A breach of any of the provisions of this order is punishable under s 188 of the Indian Penal Code

(xiii)

Given under my hand and the seal of the Court this Tenth day of July, 1966

(Sd) R S JOHRI,
District Magistrate, Agra"

A public meeting in connection with the observance of U P Bundh Day had been arranged to be held in the evening of 11th July, 1966 in Phulatti Bazar, Agra and it was to be addressed by Dr Ram Manohar Lohia Dr Ram Manohar Lohia arrived at Rajamandi Railway Station, Agra in the afternoon of 11th July, 1966 by the Toofan Express and when he came out of the railway station he was arrested by the Police The other petitioners who were present at the railway station

to receive Dr Ram Manohar Lohia, were also arrested by the police at the same time These arrests were for alleged violation of the above order of the District Magistrate of Agra Counter affidavits filed on behalf of the opposite parties do not disclose the acts which the petitioners are said to have committed in violation of the order of the District Magistrate, but they may be gathered from Annexure 4 to the counter affidavit of Sri J P Srivastava, Assistant Public Prosecutor, Agra The annexure purports to be a copy of a report made in the General Diary of Police Station Hari parvat, Agra on 11th July, 1966, at 5 00 p m by Kr Tej Pal Singh, Inspector in charge, who effected the arrests of the petitioners with the help of other police officers It has been stated in the report that after getting down from the train Dr Ram Manohar Lohia delivered an objectionable speech at the platform of Rajamandi Railway Station stressing that the Bundh had to be organised at all costs and that the speech created a fear in the public mind It has further been stated in the report that the other petitioners formed a procession and joined Sri Ram Manohar Lohia in shouting slogans of various kinds Mention may also be made of the fact that in para 14 of their petition the petitioners say that at the time of his arrest Dr Ram Manohar Lohia asked the police officers who had arrested him as to whether they were imposing restrictions on freedom of speech and they replied that he had already delivered a speech However, whether the petitioners did the acts alleged to have been done by them and whether those acts constituted a violation of the order of the District Magistrate are questions which are not to be determined in this proceeding and indeed neither Sri *S N Kacker*, learned counsel for the petitioners nor Dr Ram Manohar Lohia who addressed the Court also in person dealt with these questions

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The arrest of the petitioners took place at about 2 45 p m The same day at about 4 00 p m they were produced before Sri S N Sharma, Judicial Officer, Agra, who remanded the petitioners to jail custody up to 12th July, 1966 Till then no complaint had been filed against the petitioners On 12th July, 1966, however, opposite party no 2 the District Magistrate of Agra filed a complaint against the petitioners before Sri A N Kapoor, Magistrate, 1st Class, Agra, stating that the petitioners had contravened his prohibitory order under s 144 Cr P C, dated 10th July, 1966 and the contravention was punishable under s 188, I P C The petitioners were not brought to court from jail on that date and an application, copy of which is Annexure 5 to the counter affidavit of Sri J P Srivastava was moved on behalf of the State before Sri A N Kapoor stating that due to heavy law and order duties it was not possible to arrange escort for bringing undertrials from jail and requesting him that proceedings in the case against the petitioners be taken in the jail premises The Magistrate accepted the request, but reached the jail at about 5 00 p m The petitioners were produced before him and copies of the complaints filed against them by the District Magistrate of Agra, and, according to the counter affidavit of Sri J P Srivastava, Assistant Public Prosecutor, Agra, copies also of the General Diary report made by Kr Tej Pal Singh in police station Hariparvat on 11th July 1966, at 5 00 p m were furnished to them The petitioners made an application, copy of which is Annexure 6 to the counter affidavit of Sri J P Srivastava praying that further proceedings in the case be taken forthwith and the statements of the petitioners and the prosecution witnesses be recorded The Magistrate, however, adjourned the hearing of the case to 16th July, 1966 with the direction that it would take

place in court Meanwhile on 13th July 1966 the petitioners applied to the Additional District Magistrate (Judicial) Sri Chitrangad Singh for the transfer of the case from the Court of Sri A N Kapoor The application was allowed on 14th July 1966 and the Additional District Magistrate (Judicial) transferred the case from the Court of Sri A N Kapoor to his own court On 16th July, 1966 an application was moved on behalf of the State before the Sessions Judge, Agra, for the transfer of the case from the Court of Sri Chitrangad Singh, Additional District Magistrate (Judicial) and for staying proceedings meanwhile While this application was pending Sri Chitrangad Singh was transferred from Agra and Sri K C Seth took over charge as Additional District Magistrate (Judicial) Agra on 18th July, 1966 The State did not thereafter press its application for transfer On 20th July 1966 the petitioners sent this petition from jail A day later i e on 21st July 1966 the petitioners were released from jail on their furnishing personal bonds of Rs 200 each as directed by the Sessions Judge Agra by his order dated 16th July 1966 The position therefore is that a case under s 188 I P C for the alleged infringement of the above quoted order of the District Magistrate passed under s 144, Cr P C is pending against the petitioners and they have been released from jail on their executing personal bonds

The writ petition as originally presented by the petitioners contains the following prayers

> (1) S 144 Cr P C or that part of it which relates to disturbance of the public tranquillity or a riot or an affray be struck down as unconstitutional and

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(2) as a consequence of the grant of the above prayer the petitioners be released, but even if the State withdraws the case against the petitioners, the question of constitutionality of s 144, Cr P C be determined

In the course of the hearing of the petition the petitioners made an application for amendment of their petition seeking to add the prayer that s 188 I P C also be declared unconstitutional, and the application was allowed The petition thus challenges the validity of s 144 Cr P C under which the order of the District Magistrate of Agra which the petitioners are alleged to have contravened was passed and also the validity of s 188, I P C under which a prosecution is pending against the petitioners

On behalf of the State the learned Government Advocate raised a preliminary objection to the hearing of the petition He urged that since the petitioners have been released from jail their petition has become infructuous and no writ of *habeas corpus* can now be issued The objection is plainly untenable The petitioners have been released on their furnishing personal bonds as required by the order of the Sessions Judge of Agra The release has not therefore, restored the petitioners to their liberty and they are subject to the restraint of the bonds that they have furnished and may again lose the limited freedom granted to them on breach of the conditions of the bonds In the case of *Babu Lal Parate* v *The State of Maharastra* (1) the Supreme Court had before it a petition under Art 32 of the Constitution praying among other things for a writ of *habeas corpus* by a petitioner who was released on bail by the trying Magistrate after the proceedings pending against him had been stayed by the Supreme Court, but the Supreme Court did not, on account of the release of the petitioner treat the

(1) A I R 1961 (S C) 884

petition as infructuous but disposed it of on merits after a determination of the questions raised in the petition The question whether a person who has been released on bail can present a petition for a writ of *habeas corpus* was specifically raised before a Division Bench of this Court in *Zahir Ahmad* v *Ganga Prasad* (1) and it was held that such a person remains under the control of the court and notionally in the custody of the court and he can, therefore present a petition for a writ of *habeas corpus* The learned Government Advocate sought to distinguish these cases on the basis that the petitioners therein had been released on bail whereas the petitioners in the instant case have been released only on their executing personal bonds This cannot however, be any basis for distinction A personal bond, as a condition of release, involves restrictions on liberty just as bail does, and if a person already on bail may present a petition for a writ of *habeas corpus* or a person released on bail subsequent to the presentation of such a petition may have his petition decided on merits there appears to be no reason why a person who has been released on his furnishing a personal bond may not present a petition, or a person upon his release on furnishing personal bond subsequent to the presentation of a petition for *habeas corpus*, may not obtain a decision on the questions raised in his petition if he is otherwise entitled to do so The preliminary objection must therefore be overruled and the petition must be decided on merits

The constitutionality of s 144 Cr P C has been challenged on behalf of the petitioners on two grounds firstly that the section authorizes the imposition of restrictions on the right to freedom of speech and expression in the interests of things which are not covered

(1) 1962 A L J 654

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by Art. 19(2) of the Constitution, and restrictions on the right to assemble peaceably and without arms in the interests of things which are not covered by Art. 19(3) of the Constitution, and secondly, that the powers which are exercisable under the section are so wide that the restrictions which it has the effect of imposing upon the fundamental rights are unreasonable. In view, however, of the pronouncement of the Supreme Court in the case of *Babu Lal Parate* v. *The State of Maharastra* (1) it is on the first ground that emphasis has really been laid.

It is indisputable that the second ground of challenge is clearly ruled out by the decision of the Supreme Court in the above mentioned case. The question of the vires of s. 144, Cr. P. C. was raised in the case on a petition under Art. 32 of the Constitution and the main contention on behalf of the petitioners was that the section places unreasonable restrictions on the rights guaranteed under Arts. 19(1)(*a*) and (*b*) of the Constitution. After an exhaustive consideration of the provisions of s. 144, Cr. P. C. the Supreme Court repelled the contention and held that it cannot be said that by reason of the wide amplitude of the power which s. 144 confers on certain Magistrates it places unreasonable restrictions on certain fundamental rights. The second ground taken on behalf of the petitioners must, therefore, be rejected at once and it does not call for any further comment.

The question, then, is whether the law laid down by the Supreme Court in the above case also precludes the first ground of attack on the constitutionality of s. 144, Cr. P. C. Before proceeding to consider that question, however, it is necessary to make a few matters clear. The petitioners in this case are concerned with the constitutionality of only that part of s. 144 which

(1) A.I.R. 1961 (S.C.) 884.

relates to the power of issuing a direction of the nature specified therein if the direction is considered likely to prevent or tends to prevent disturbance of the public tranquillity The prohibitory order which the petitioners are said to have contravened shows in unmistakable terms that it was on that part of the section that the District Magistrate based his order According to the preamble of the order there were two reasons for passing it Firstly information had been received that in connection with the U P Bundh Agitation there was likelihood of some sections of the public indulging in violence and lawlessness in order to force the closure of shops offices etc and thereby causing breach of the peace Secondly immediate prevention and speedy remedy was desirable for maintaining public peace and tranquillity The first reason only expressed the information received by the District Magistrate and even if it may be said that the District Magistrate appears to have accepted the information as correct it merely furnished the occasion for passing the order but the object intended to be achieved by the order was contained only in the second reason It is true that the words used in the order in this connection are— desirable for maintaining public peace and tranquillity but there can be no doubt that the word public governs both peace and tranquillity and this has not been disputed on behalf of the petitioners The position therefore is that the order of the District Magistrate was founded on that part of s 144 which empowers the issue of a certain direction if the Magistrate authorised to issue it considers that such direction is likely to prevent or tends to prevent disturbance of the public tranquillity and since that part alone affects the petitioners their challenge must be confined to that part of s 144 Cr P C and it cannot extend to the entire section At one stage of his argument Sri *S N*

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Kacker, learned counsel for the petitioners suggested that if any of the objects for which an order under s 144 Cr P C may be passed falls outside the saving provisions of Art 19(2) and (3) of the Constitution the whole section becomes *ultra vires* He also drew attention to the case of *Sri Raj Narain Singh* v *The District Magistrate, Gorakhpur* (1) where it was held that some of the clauses of the section were in excess of the limits permitted by Art 19(2) of the Constitution Later however this argument was not pressed by the learned counsel and he confined himself to that clause of the section which relates to disturbance of the public tranquillity I may however observe that the various activities for the prevention of which a direction under s 144, Cr P C may be issued are quite separate and distinct and the clauses relating thereto are not inextricably mixed but capable of surviving independently of one another Bearing in mind the test of severability laid down by the Supreme Court in *State of Bombay* v *Balsara* (2) and *State of Bihar* v *Kameshwar* (3) it must be held that even if clauses relating to some of the above mentioned activities are found to offend against the Constitution the whole of s 144 Cr P C would not on the account become unconstitutional and void In *Sri Raj Narain* v *The District Magistrate, Gorakhpur* (1) also the various clauses relating to the purposes for which an order under s 144 Cr P C may be passed were held to be severable

The alternative prayer in the first relief claimed by the petitioners in their petition is that such parts of s 144 Cr P C as relate to the public tranquillity riot and affray be struck down and Dr Ram Manohar Lohia in the course of his argument on the constitutionality of s 144 Cr P C dwelt at length on those

(1) A I R 1956 All 481
(2) A I R 1952 (S C) 252
(3) A I R 1951 (S C 318

parts of the section also that relate to riot and affray besides the part relating to the public tranquillity I however, think that in this case the vires of only that part of s 144 has to be determined which relates to disturbance of the public tranquillity because the order by which the petitioners are affected has that part alone as its basis Nowhere in the order passed by the District Magistrate is there any reference to riot and affray and even the first reason given for the order—which as I have already said was only the information received by the District Magistrate—there is nothing that may relate the order to prevention of a riot or an affray

I may now briefly set forth the argument advanced on behalf of the petitioners for attacking the constitutionality of that part of s 144 which relates to disturbance of the public tranquillity and examine whether in view of what has been laid down by the Supreme Court in *Babu Lal Parate* v *The State of Maharashtra* (1) the argument is still open or whether the matter should be regarded as settled in favour of the section so far as this Court is concerned

The argument on behalf of the petitioners is this Cls (2) and (3) of Art 19 of the Constitution do not extend their protection to a law imposing on the rights respectively mentioned therein restrictions in the interests of the public tranquillity Public order which is one of the things mentioned in cl (2) and the only thing mentioned in cl (3) is not synonymous with the public tranquillity and public disorder connotes a disturbance much graver in nature and magnitude and much larger in extent than a disturbance of the public tranquillity A law authorizing the passing of an order for preventing disturbance of the public tranquillity is not in relation to the right guaranteed under Art 19(1)(a) of the Constitution saved by cl (2) of Art 19 because if public order is left out of consideration,

(1) A I R 1961 (S C) 884

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there remains nothing in that clause which may be said to cover the public tranquillity, and in relation to the right guaranteed by Art. 19(1)(*b*), it is not saved by cl. (3) of Art. 19 because that clause mentions 'public order' alone. In regard to the Supreme Court decision in *Babu Lal Parate's* case (1) it was submitted on behalf of the petitioners that in that case the validity of s. 144, Cr. P. C. was not challenged on the ground that the section was outside the saving categories mentioned in cls. (2) and (3) of Art. 19 and the challenge to the validity of the section was limited to the ground that the restrictions placed by it on certain fundamental rights are unreasonable. In the present case it was contended the constitutionality of the very power to place restrictions irrespective of their reasonableness, is in question. It was also said that the question of the power to place restrictions was not considered by their Lordships in *Babu Lal Parate's case* (1) and in any event such observations as were made in that case on matters not covered by the ground on which the validity of s. 144 was challenged are in the nature of *obiter* and are not binding. Great reliance was placed on behalf of the petitioners on the case of *Ram Manohar Lohia* v. *The State of Bihar* (2) and it was urged that the first ground of the petitioners' attack on the relevant clause of s. 144 is supported by what has been laid down there regarding the meaning of the expression 'public order'.

It is no doubt true that in *Babu Lal Parate's* case (1) it does not appear to have been contended on behalf of the petitioners that the power conferred by s. 144 Cr. P. C. is not in the interests of things specified in cls. (2) and (3) of Art. 19 of the Constitution and the section is therefore *ultra vires*, irrespective of the fact whether the restrictions it imposes are reasonable or

(1) A.I.R. 1961 (S.C.) 884. (2) A.I.R. 1966 (S.C.) 740.

not But it is not possible on that basis to contend that the Supreme Court did not consider the constitutionality of the section from that point of view also The question of the reasonableness of restrictions could arise only when the power to impose restrictions was found to be present and, therefore the contention that the Supreme Court did not consider whether such a power really existed is unacceptable Para 16 of the report of the judgment in that case clearly indicates that their Lordships considered the question whether the activities with regard to which the Magistrate is entitled under s 144 Cr P C to place restraint are such that their prevention would be in the interests of public order and held that they are such activities If any doubt is still felt about the scope and effect of this decision it should be dispelled by the final conclusion reached by their Lordships The conclusion has been stated in para 34 of the report and is as follows —

> We have, therefore, reached the conclusion that the order of the District Magistrate is not unconstitutional either because s 144 is itself violative of fundamental rights recognised in Art 19 or on the ground that it is vague and places unreasonable restrictions on those fundamental rights

The opinion expressed in the case by their Lordships, therefore, is that s 144, Cr P C does not violate Art 19 of the Constitution and it necessarily means that such parts of the section as may have the effect of placing restrictions on the rights guaranteed under Art 19(1)(*a*) and (*b*) are respectively protected by cls (2) and (3) of Art 19 This being the law declared by the Supreme Court it is binding on this Court under Art 141 of the Constitution and even the first ground on which the validity of s 144 has been challenged on behalf of the petitioners must accordingly be rejected

The contention that such observations of the Sup

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reme Court in the above case as cover matters beyond the reasonableness of the restrictions placed on certain fundamental rights by s. 144 Cr. P. C. are *obiter* and therefore, of no binding effect is wholly misconceived. A declaration of law made by the Supreme Court is not a mere precedent and the necessity of the declaration is not a condition of its binding effect. Even if such a declaration is in the nature of an *obiter* Art. 141 of the Constitution makes it binding on all courts. But quite apart from this it is obvious that the question whether cls. (2) and (3) of Art. 19 at all permit the imposition of restrictions is logically prior to the question of the reasonableness of the restrictions, and no part of the observations of their Lordships relating to the constitutionality of s. 144, Cr. P. C. was therefore incidental or unnecessary for the decision of the case and no part of the observations can be regarded as *obiter*. It is a matter of no consequence that the constitutionality of s. 144, Cr. P. C. was challenged in that case only on the narrow ground of the reasonableness of the restrictions placed by it and not also on the wider ground of the total absence of the power to place restrictions. A declaration of law made by the Supreme Court remains a binding declaration, irrespective of the fact whether all the *pros and cons* of the matter to which it relates were put forward and argued before it. And this would be specially so when the law declared is in regard to the constitutionality of a statute or a rule and in such a case the binding effect of the declaration cannot be measured by or limited to the points raised on behalf of the parties or to which express reference is made in the judgment. In this connection I may refer to the following cases.

In *Sharda Prasad Srivastava* v. *Accountant General, Uttar Pradesh* (1) the constitutional validity of a con-

(1) A.I.R. 1955 All. 496

tract of service was in question In a very similar earlier case the Supreme Court had declared a contract of that nature valid Dealing with a new line of attack taken on behalf of the person challenging the validity of the contract V BHARGAVA, J observed

> Secondly, once the Supreme Court has declared that such a contract of service is valid it is not open to me to examine the validity of that contract even on any ground which may not have been considered by the Supreme Court The law declared by the Supreme Court is binding whether the declaration is made after discussing all possible aspects or without doing so

In *Commissioner of Income tax, U P and V P* v *Man Mal Uttam Chand* (1) a Division Bench of this Court had before it a reference under s 66(1) of the Indian Income Tax Act 1922 where one of the points involved in the case had previously been decided by the Supreme Court under the Travancore Income Tax Act in which the relevant provisions were similar V BHARGAVA J, who delivered the judgment of the Bench, observed as follows in regard to the effect of the decision of the Supreme Court

> In that case their Lordships did not consider the effect of s 14(2)(*c*) of the Indian Income Tax Act, as it stood at the relevant time but we think that in spite of the fact that that provision was not considered that decision given by the Supreme Court is binding on us and is a declaration of law under Art 141 of the Constitution Consequently we are bound to follow that decision

In *Harkishan Das* v *Emperor* (2) the *vires* of certain provisions of Defence of India Act was challenged Adverting to a Federal Court decision and dealing, in

(1) XLII I T R 203 (2) A I R 1944 Lah 33 (F B)

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have established it must be taken that public safety is used as a part of the wider concept of public order

and referring to Entry in List III (concurrent List) of the 7th Schedule of the Constitution which includes the security of a State and maintenance of public order as distinct topics of legislation observed—

> The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance treating for this purpose differences in decree as if they were differences in kind

FAZL ALI, J took a different view which he had expressed more fully in *Brijbhushan* v *State of Delhi* (1), but he also observed that public safety had as a result of a long course of legislative practice acquired a well recognised meaning and was taken to denote safety or security of the State and that the expression public order was wide enough to cover small disturbances of the peace which do not jeopardise the security of the State and paraphrased the words public order as public tranquillity

Both the aspects of the matter were again before this Court in *Superintendent, Central Prison, Fatehgarh* v *Ram Manohar Lohia* (2) when

(1) 1950 S C R 605=A I R 1950 (S C) 129
(2) (1960) 2 S C R 821=A I R 1960 (S C) 633

dealing with the wording of cl (2) of Art 19 as amended by the Constitution (First Amendment) Act 1951 it fell to be decided what public order meant SUBBA RAO, J speaking for the Court referred to all earlier rulings and quoting from them came to the conclusion that public order was equated with public peace and safety and said

> Presumably in an attempt to get over the effect of these two decisions the expression public order was inserted in Art 19(2) of the Constitution by the Constitution (First Amendment) Act 1951 with a view to bring in offences involving breach of purely local significance within the scope of Art 19

Summing up the position as he gathered from the earlier cases the learned Judge observed

> Public order is synonymous with public safety and tranquility it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals such as revolution civil strive war affecting the security of the State

These observations determine the meaning of the words public order in contradistinction to expressions such as public safety security of the State They were made in different contexts The first three cases dealt with the meaning in the legislative Lists as to which it is settled we must give as large a meaning as possible In the last case the meaning of public order was given in relation to the necessity for amending the Constitution as a result of the pronouncements of this Court The context in which the words were used

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was different, the occasion was different and the object in sight was different

Besides the passages quoted in the above decision from the *Superintendent, Central Prison, Fatehgarh* v *Dr Ram Manohar Lohia* (1) I think it necessary to draw attention to one more passage from that case which runs as follows

> But in India under Art 19(2) this wide concept of public order is split up under different heads It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State friendly relations with foreign States public order decency or morality or in relation to contempt of court defamation or incitement to an offence All the grounds mentioned therein can be brought under the general head public order in its most comprehensive sense But the juxtaposition of the different grounds indicates that though some times they tend to overlap they must be ordinarily intended to exclude each other Public order is therefore something which is demarcated from the others In that limited sense particularly in view of the history of the amendment it can be postulated that public order is synonymous with public peace safety and tranquillity

The conclusions deducible from these decisions appear to be these that the expression public order is a comprehensive expression and it should be given a large meaning though not as large as would be given to it in the legislative Lists of the Constitution, that public order' at least comprehends within itself public tranquillity even if it cannot be equated with public

(1) A I R 1960 (S C) 633=1960 (3) S C R 821

tranquillity and that public disorder unlike national upheavals affecting the security of the State are of local significance and as compared to them less serious It was urged on behalf of the petitioners and particularly by Dr Ram Manohar Lohia that public disorder connotes a disturbance much graver in character than a disturbance of the public tranquillity and that there can be situations in which public tranquillity is disturbed but not public order It was said that this contention is supported by the observations of HIDAYATULLAH, J in *Ram Manohar Lohia* v *The State of Bihar* (1) and reliance was placed on paras 51 and 52 of the report of his Lordship's judgment I however do not find that the observations made by his Lordship support the contention which has been put forward The question involved in that case was whether the expression law and order used by a District Magistrate in an order purporting to have been passed by him under r 30(1)(b) of the Defence of India Rules meant the same thing as public order for maintaining which an order of that kind could be passed under the said provision His Lordship held that public order and order are not identical and explained the distinction between the two concepts In para 51 of the judgment his Lordship summed up the distinction in the following words

> The contravention of law always affects order but before it can be said to affect public order it must affect the community of the public at large

His Lordship then proceeded to point out in para 52 the comparative degrees of gravity involved in disturbances of law and order public order and security of the State, and observed

> It will thus appear that just as public order in the rulings of this Court (earlier cited) was said

(1) A I R 1966 S C 740

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to comprehend disorders of less gravity than those affecting security of State; law and order also comprehends disorders of less gravity than those affecting public order One has to imagine three concentric circles Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State By using the expression maintenance of law and order the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules

The position, therefore, is that while public order is included in and is a part of order it does not cover the entire area of order, with the result that although all public disorders are certainly disorders all disorders are not public disorders, the latter being those aggravated forms of disorders which affect the public at large What makes this difference in the ideas conveyed by the expressions order and public order is obviously the word public in the latter expression Since however, that word is common to both public order and public tranquillity it is clear that the distinction between order and public order cannot hold good between public tranquillity and public order The question involved in the present case is whether public tranquillity has the same connotation as public order or is at least included in it, but on that question his Lordship has expressed no opinion, and in answering it we have to be guided by the earlier decisions which have been referred to in his Lordship's judgment and also by a later decision of the Supreme Court to which I shall presently refer Besides the observations quoted by HIDAYATULLAH, J from the

earlier decisions I may draw attention to two other observations made by SUBBA RAO J (as his Lordship then was) in *The Superintendent, Central Prison, Fatehgarh* v *Dr Ram Manohar Lohia* (1) In para 11 of the report his Lordship said that it can be postulated that public order is synonymous with public peace, safety and tranquillity and in para 18 of the report his Lordship summed up the position by laying down that public order is synonymous with public safety and tranquillity Observations to a similar effect were made in the later case of *O K Ghosh* v *E X Joseph* (2) where GAJENDRAGADKAR, J (as his Lordship then was) speaking for the Supreme Court, said that in cl (2) of Art 19 public order is virtually synonymous with public peace safety and tranquillity It is not necessary to determine whether in the light of these decisions public order and public tranquillity should be regarded as interchangeable terms and public tranquillity by itself and without anything else may be equated with public order, or whether a public order has some other requisites besides public tranquillity Even if public order and public tranquillity are not entirely co-extensive in content the decisions do not in my opinion, leave any room for doubt that public tranquillity is at least an essential constituent of public order and that public order is a comprehensive concept including within itself as one of its integral parts public tranquillity The contention of Dr Ram Manohar Lohia that disturbance of the public tranquillity cannot in all cases result in the disturbance of public order could have been acceptable if it had been possible to say that public order can in some cases dispense with the public tranquillity and exist without it Since, however public order is inconceivable in the absence of the public tranquillity,

(1) A I R 1960 (S C) 633 (2) A I R 1963 (S C) 812

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whatever has the effect of disturbing the public tranquility must necessarily disturb public order and it is not possible to say of any situation that although the public tranquility has been disturbed public order has remained unaffected The obvious corollary is that whatever is done for preventing disturbance of the public tranquility must be regarded as done for preventing disturbance of the public order and hence in the interests of public order The restrictions which s 144 Cr P C permits to be imposed for preventing disturbance of the public tranquility are, therefore, restrictions within the limits of the saving provisions of Art 19(2) and (3)

The view that I take in regard to that part of s 144, Cr P C which relates to the public tranquility was also the view taken by this Court in *Sri Raj Narain Singh* v *District Magistrate, Gorakhpur* (1) to which I have already referred in another connection The Division Bench which decided that case held that to the extent to which s 144 allows the placing of restrictions for preventing disturbance of the public tranquility or a riot or an affray it is within the limits permitted by Art 19(2) and (3) although it also expressed the opinion that some of the purposes for which restrictions are allowed to be placed by the section are in excess of the said limits In the instant case, however the constitutionality of only that part of s 144 is involved which relates to the public tranquility, because the order affecting the petitioners was based on that part alone It is therefore unnecessary to express any opinion on any other part of the section

Before leaving this aspect of the case I must note that in the course of arguments on behalf of the petitioners it was not urged that the prohibitory order passed by the District Magistrate of Agra was not an order which

(1) A I R 1956 All 481

could be validly passed under s 144, Cr P C or that the order suffered from any other defect In fact, Sri *S N Kacker*, learned counsel for the petitioners and also Dr Ram Manohar Lohia explicitly stated that they pressed the petition only on the basic question of the constitutionality of s 144 Cr P C and s 188, I P C and they did not want any other matter to be gone into by this Court in this proceedings

I now proceed to consider the challenge to the *vires* of s 188 I P C The argument which Dr Ram Manohar Lohia who alone addressed the Court on this part of the case advanced in support of the chal lenge were two firstly that s 188 I P C is incon sistent with s 144 Cr P C inasmuch as disturbance of the public tranquillity is not mentioned in the form er section and this omission leads to the anomaly that while an order under s 144 Cr P C may be passed in the interests of the public tranquillity a disobedience of that order is not punishable if it merely causes or tends to cause a disturbance of the public tranquillity and secondly, that s 188 I P C makes the disobedi ence of an order passed under s 144 an offence if the disobedience causes or tends to cause any of the results mentioned in the section but none of the results—not even riot or affray—is such that the fundamental rights of freedom of speech and peaceable assembly may be restricted for the purpose of avoiding it and therefore by reason of the fact that the section makes the exer cise of even the aforesaid fundamental rights punish able it is void

It is certainly true that although s 188 I P C men tions in the same words and in the same sequence all other things for preventing which a direction may be issued under s 144 Cr P C it does not mention dis turbance of the public tranquillity About the reason for the absence of these words in s 188 I P C one

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can only speculate S 62 of the Code of 1861 s 518 of the Code of 1872 and s 144 of the Code of 1882 which were provisions analogous to s 144 of the present Code of Criminal Procedure did not contain the words disturbance of the public tranquillity and it was in s 144 Cr P C of the present Criminal Procedure Code of 1892 that these words were for the first time introduced No corresponding amendment was however made in the Indian Penal Code It may be that the necessity of amending s 188 I P C and adding therein the said words was overlooked and the mistake has not been detected by the Legislature so far But it may also be that the omission to make a corresponding change in s 188 I P C was deliberate The Legislature might have thought that causing or tending to cause disturbance of the public tranquillity as an ingredient of an offence would not be sufficiently definite for positive proof or disproof and the disobedience of an order lawfully promulgated by the public servant should be made an offence only if it causes or tends to cause the comparatively more definite and determinate results mentioned in s 188 I P C To whatever reason however the absence of the words disturbance of the public tranquillity in s 188 I P C might be due there appears to be no inconsistency between s 144, Cr P C and s 188 I P C and even if there may be some inconsistency it cannot to my mind make either of the sections unconstitutional

Prevention of the disturbance of the public tranquillity is one of the objects for which the competent Magistrate may pass an order under s 144 Cr P C but in determining whether a person disobeying the order has committed an offence punishable under s 188 I P C what has to be seen is not whether the disobedience caused or tended to cause disturbance of the public tranquillity, but whether it caused or tend

ed to cause any of the results mentioned in the second and the third clauses of s 188 I P C Disobedience of an order passed under s 144 Cr P C for preventing disturbance of the public tranquillity would not therefore constitute an offence under s 188 I P C if it does not cause any of the results mentioned in the latter section although it may cause or tend to cause a disturbance of the public tranquillity This may only have the effect of frustrating in some cases a part of the purpose for which an order under s 144 Cr P C is passed but it does not create any conflict between the two sections or lead to any anomalous result unless the frustration to any extent of the object of the order is itself called an anomaly I say part of the purpose of the order because the things enumerated in the second and the third clauses of s 188 I P C are not unrelated to the public tranquillity and it will be noted riot and affray are included in Chap VIII of the Indian Penal Code which deals with what have been described by the Code as offences against the public tranquillity However the fact that in some circumstances an act which was intended to be prevented by an order under s 144 Cr P C may not be covered by s 188 I P C and may go unpunished cannot be said to introduce any element of constitutional infirmity in either of the two sections

Coming to the second argument of Dr Ram Manohar Lohia regarding s 188 I P C I may mention that the complaint filed by the District Magistrate of Agra against the petitioners states only the alleged fact of disobedience of the directions issued by him under s 144 Cr P C and there is nothing in it to show the results if any the disobedience caused or tended to cause However Sri *S N Kacker* and Dr Ram Manohar Lohia stated in the course of their argument that they did not seek to support the petition on this

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feature of the complaint The argument of Dr Ram Manohar Lohia was that the whole of s 188, I P C was unconstitutional although he laid special emphasis on that part of it which relates to riot and affray, presumably because he thought that the other things mentioned in the second and the third clauses of s 188, I P C could not possibly have any relation to public order In my opinion, there is a basic misconception involved in the argument S 188, I P C does not make punishable any act as such but only when it is done in disobedience to an order duly promulgated by a public servant lawfully empowered to do so In the absence of such an order the act would remain altogether unaffected by the provisions of the section and it is the order prohibiting the act that has the effect of attaching to it the penalty of the section What is, therefore made punishable under s 188 I P C, when an order placing constitutionally permissible restrictions on certain fundamental rights is disobeyed, is not the exercise of the fundamental rights but the transgression of the constitutionally valid restrictions imposed upon the exercise of the rights There can be no doubt that if s 188 I P C had made mere disobedience of an order of the above character an offence even though the disobedience was not attended by any thing else it would have been open to no objection on the score of constitutionality Does the section, then suffer from the voice of unconstitutionality because it makes the disobedience punishable only under certain conditions ? In so far as s 188, I P C requires something more than mere disobedience of an order imposing permissible restrictions on fundamental rights before an act can become an offence under that section it only mitigates the rigour of the restrictions It is, therefore incorrect that s 188 I P C makes the exercise of the fundamental rights guaranteed under Art

19(1)(*a*) and (*b*) punishable in the interests of things other than public order If an order under s 144 Cr P C imposing restrictions on such rights is constitutional by reason of its being in the interests of public order, a law punishing its disobedience would also be constitutional irrespective of the presence or absence of any other requisite for making the disobedience punishable The second argument which has been advanced for challenging the constitutionality of s 188 I P C is also therefore, untenable

As a result of the foregoing discussion I am of the opinion that s 144 Cr P C in so far as it empowers the issue of directions which are likely to prevent or tend to prevent a disturbance of the public tranquillity, is constitutional and not *ultra vires* I express no opinion on any other part of s 144, Cr P C because it is not necessary to do so I am also of the opinion that s 188, I P C is constitutional and not *ultra vires*

The points raised in support of the petition fail and the petition should accordingly be dismissed

MAHESH CHANDRA, J —The facts leading to the arrest of the petitioners are very simple They have been given in detail in the judgment of my learned brother and need not be repeated The District Magistrate of Agra issued an order on 10th July, 1966 under s 144, Cr P C In the preamble of the order he mentioned that from the information received in connection with the U P Bundh agitation there was likelihood of some sections of the public indulging in violence and lawlessness to force the closure of the shops offices etc and thereby causing breach of the peace Immediate prevention and speedy remedy was considered desirable for maintaining public peace and tranquillity Consequently he issued a number of directions under s 144 Cr P C In connection with

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the observance of the U P Bundh Day a public meeting had been arranged for the evening of 11th April 1966 in Phulatti Bazar Agra It was to be addressed by Dr Ram Manohar Lohia who arrived at Raja Mandi Railway station by the Toofan Express at 2 45 p m on 11th July 1966 and was arrested by the police when he came out of the railway station The other petitioners who had come to receive Dr Lohia were also arrested at the same time It was alleged that Dr Lohia delivered an objectionable speech on the platform of the Railway Station and that objectionable slogans of various kinds were shouted by the petitioners All these arrests were alleged to be in violation of the order of the District Magistrate of Agra A case under s 188 I P C for the infringement of the District Magistrate s order is pending against the petitioners who have been released on execution of personal bonds

The petitioners pray that s 144 Cr P C or that part of it which related to the disturbance of public tranquility or a riot or affray be struck down as unconstitutional and that the petitioners be released They prayed further that even if the case against the petitioners is withdrawn by the State the question of the constitutionality of s 144 Cr P C should be determined By an amendment they have also been allowed to add the prayer that s 188, I P C be also declared unconstitutional

I agree with my learned brother that the preliminary objection of the learned Government Advocate that the petition has become infructuous because of the release of the petitioners from July is untenable The petitioners have not been restored to their liberty for they are subject to the restraint of the bonds furnished by them The petition of Babu Lal Parate was disposed of by the Supreme Court on merits even though

the petitioner had been released on bail, vide *Babu Lal Parate* v *State of Maharasthra* (1) In *Zahir Ahmad* v *Ganga Prasad* (2) this Court held that a person remains under the control of the Court and notionally in its custody even after release on bail and could consequently present a petition for a writ of *habeas corpus* The mere fact that the petitioners in the present case have been released on execution of personal bonds does not create any difference The restrictions on liberty are there—whether it is a release on only a personal bond or on bail

It was contended by the learned counsel for the petitioners that the powers which are exercisable under s 144 Cr P C are so wide that the restrictions had the effect of imposing restrictions upon the fundamental rights are unreasonable In *Babu Lal Parate's* case (1) the Supreme Court held that the section does not confer an arbitrary power on the Magistrate in the matter of making an order and that the power of Magistrate under that section is not unlimited or untramelled It is true that the judgment is to be of the Magistrate whether in the peculiar circumstances of a case an order in exercise of these powers should be made or not But the Court was entitled to assume that power would be exercised legitimately and honestly and the section could not be struck down on the ground that the Magistrate might possibly abuse his powers The fundamental rights guaranteed under Art 19(1) of the Constitution were subject to the restrictions placed in the subsequent clauses of Art 19 permitting reasonable restrictions on the exercise of the right to freedom of speech and expression in the interest among other things of public order The action permissible under s 144 Cr P C is an anticipatory action and cannot be said to be impermissible under cl (2) and (3) of Art 19

(1) AIR 1961 SC 884 (2) 1962 A L J 654

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merely because it is anticipatory. The Supreme Court also held that the remedy of Judicial review cannot be said to be illusory. MUDHOLKAR, J., speaking for the Supreme Court, observed:

> We would also like to point out that the penalty for infringing an order under s. 144 is that provided in s. 188 I.P.C. When, therefore a prosecution is launched thereunder the validity of the order under s. 144, Cr. P. C. could be challenged.

MUDHOLKAR, J. further observed:

> Further, since the propriety of the order is open to challenge it cannot be said that by reason of the wide amplitude of the power which s. 144, confers on certain Magistrates it places unreasonable restrictions on certain fundamental rights.

I agree that these observations are binding on this Court under Art. 141 of the Constitution even though they may be in the nature of *obiter*.

It was also contended by the learned counsel for petitioners that the purposes for which the section authorises the imposition of restriction on the right to freedom of speech and expression and a right to assemble peaceably and without arms are not covered by Art. 19(2) and (3) of the Constitution and that s. 144 Cr. P. C. was consequently unconstitutional. The order of the District Magistrate of Agra in the present case recited the apprehension that section of the public were likely to indulge in violence and lawlessness in order to force closure of shops offices, etc. and thereby cause breach of the peace. It also mentioned the desirability for immediate prevention and speedy remedy for maintaining public peace and tranquility. This was thus the sole object for which the order of the the District Magistrate was made. We are consequently concerned in this petition with only that part of s. 144, Cr. P. C. which

empowered the Magistrate to issue a certain direction which he considered likely to prevent or tend to prevent disturbance of public tranquillity There is not the slightest doubt that the various activities for the prevention of which a direction may be issued by a Magistrate under s 144 Cr P C are separate and distinct and consequently that part of the section which relates to a direction likely to prevent or tend to prevent disturbance of public tranquillity is clearly separable from the other part of the section I would therefore agree with my learned brother that in this case it is not necessary to express any opinion on any other part of s 144 Cr P C

I would also agree with the conclusion of my learned brother that s 144 Cr P C in so far as it relates to a direction which is likely to prevent or tends to prevent a disturbance of public tranquillity is not *ultra vires* I would however hesitate to use any phrase or expression which might be taken to justify in the name of public order any unreasonable restriction on the right to freedom of speech and expression and to assemble peaceably and without arms True reasonable restrictions in the interest of public order have to be permitted But it is equally true that democracy is based on the right to freedom of speech and expression Without this elementary right democracy is bound to perish or degenerate into autocracy Nor can it be said that a mere disturbance of the tranquillity of a great number of people amounts to a disturbance of public order

Dr Lohia in his arguments translated the word tranquillity as शान्ति and the word order as व्यवस्था I would agree with him that the Hindi equivalents suggested by him give us a correct idea of the implications of the two words We should not forget that a democracy functions in a manner entirely different from autocracy Radical progress in demo

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cracy is bound to give rise to discussions in press and on platform involving disturbance of tranquillity of a vast number of people. For instance preparation of the people for land reforms involving the abolition of *zamindari* necessarily disturbed the tranquillity of great number of the people of the States of U. P. and Bihar since it was to effect not only the *taluqdars* and big *zamindars* but also the small *zamindars*. But it could not be said to have disturbed public order. It cannot be denied that the people were agitated and agitation is disturbance of tranquillity, for tranquillity (शान्ति) is that serenity and calmness which is bound to be disturbed and agitated when any radical reforms are about to be launched against vested interests and established views about certain state of affairs are challenged and canvassed against. Again in an enlightened democracy tranquillity of the people may be disturbed even without speech and expression. For instance prices of food rising with an inordinately high speed would disturb the tranquillity of the people and agitate their minds even though discussions in press and on platform may be completely curbed. But really no such complete stoppage of discussion could be possible in an enlightened democracy, which works by persuasion and after persuasion even by change of government by one party to government by another party. It would not therefore be correct to give the phrase in the interests of public order a meaning which would abolish all canvassing of a progressive reform or criticism and discussion of actions of government and consequent agitation of the mind of the people.

I would not therefore be prepared to go beyond the extent to which their Lordships of the Supreme Court have gone, and would not give to public order a meaning more comprehensive than that given by them. They have themselves made a distinction between

maintenance of law and order and 'public order MUDHOLKAR J observed in *Ram Manohar Lohia* v *State of Bihar* (1)

> The expression Law and order does not find any place in the rule and is not synonymous with public order It seems to me that law and order is a comprehensive expression in which would be included not merely public order but matters such as public peace tranquillity orderliness in a locality or a local area and perhaps some other matters Public order' is something distinct from order or orderliness in a local area

In the same case HIDAYATULLAH J observed at p 758

> Does the expression public order take in every kind of disorders or only some of them? The answer to this serves to distinguish public order from law and order because the latter undoubted ly takes in all of them Public order if disturbed must lead to public disorder Every breach of the peace does not lead to public disorder When two drunkards quarrel and fight there is disorder but not public disorder They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order Suppose that the two fighters were of rival communities and one of them tried to raise communal passions The problem is still one of law and order but it raises the appre hension of public disorder Other examples can be imagined The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large

(1) A I R 1966 S C 740 at pp 765 and 758

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The Supreme Court has thus refused to make public order as comprehensive as maintenance of law and order'

Relying on the observations of HIDAYATULLAH, J Dr Lohia however contended that the decision in *Ram Manohar Lohia* v *State of Bihar* (1) in 1966 modified the earlier view of the Supreme Court that public order was synonymous with public safety and tranquility This contention is without force In the judgment of HIDAYATULLAH, J in *Ram Manohar Lohia* v *State of Bihar* (1) the judgment of SUBBA RAO, J in the *The Superintendent of Central Prison, Fatehgarh* v *Dr Ram Manohar Lohia* (2) was mentioned and the specific observations of SUBBA RAO, J quoted were

> Public order is synonymous with public safety and tranquility

HIDAYATULLAH, J did not dissent from these observations in so far as the meaning of the phrase public order used in Art 19(2) of the Constitution was concerned Consequently whatever meaning might be attached to the word tranquility standing alone when the word tranquility is qualified by the word public' in s 144 Cr P C we are clearly bound by the decision of the Supreme Court in *The Superintendent of Central Prison, Fatehgarh* v *Dr Ram Manohar Lohia* (2) that public order is synonymous with public safety and tranquility HIDAYATULLAH, J himself went on to place law and order' in the largest concentric circle and public order in the next circle and security of State in the smallest circle and the reason for placing 'public order in a smaller circle than that of law and order was the use of the word 'public' before the word order'

(1) A I R 1966 S C 740 (2) A I R 1960 S C 633

While on the one hand the necessity for the right to freedom of speech and expression and to assemble peaceably and without arms in a democracy is there, it cannot be denied that this right itself cannot be properly exercised by all without permitting a law which imposes reasonable restrictions in the interests of public order No democracy can exist if public order is freely allowed to be disturbed by a section of the citizens That was the background in which cls (2) and (3) of Art 19 of the Constitution had to be amended by insertion of the words public order In view of the decision of the Supreme Court equating public order with public safety and tranquility the provisions in s 144, Criminal Procedure Code for issue of directions which are likely to prevent or tend to prevent a disturbance of the public tranquility cannot be said to be *ultra vires*

Dr Ram Manohar Lohia also contended that s 188 I P C, itself was *ultra vires* For the reasons mentioned by my learned brother and which I need not repeat I am also of the view that s 188 I P C is constitutional and not *ultra vires*

I would, therefore agree that the petition be dismissed

ORDER —We dismiss the petition

Petition dismissed

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Hidayatullah, the Hon'ble Mr Justice Sikri and the Hon'ble Mr Justice Vaidialingam

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March 31

M/s THE SHAHDARA (DELHI) SAHARANPUR LIGHT RAILWAY CO LTD APPELLANT

v

THE MUNICIPAL BOARD, SAHARANPUR AND ANOTHER RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

U P Municipalities Act, *(II of)* 1916 *s* 128(1)(xiii)—*Rules under determinal tax by Municipal Board of Saharanpur Sch B, Item* 2—*Indian Tramways Act (XI of)* 1886 *sub ss* (5) *and* (6) *of s* 3—*Indian Railways Act (I of* 1890) *sub ss* (1) *and* (4) *of s* 3—*Shahdara (Delhi) Saharanpur Light Railway Co Ltd whether exempt from terminal tax imposed by Municipal Board Saharanpur*

The Shahdara (Delhi) Saharanpur Light Railway Co Ltd which had been registered under the Tramways Act and to which the Railways Act (except s 135 thereof) had been extended to apply is a railway within the meaning and for the purposes of exemption from payment of terminal tax under item 2 of Sch B of the Rules framed by the Municipal Board of Saharanpur under the Municipalities Act

Thornton Urban Council v *Blackpool and Fleetwood Tramroad Company* (1) applied

Civil Appeal No 1323 of 1966 from the Judgment and Order, dated the 10th September 1965 of the Allahabad High Court in Civil Miscellaneous Writ No 3567 of 1965

Niren De, for the Appellant

R K Garg, D K Agarwala and *M V Goswami,* for the Respondent No 1

The following Judgment of the Court was delivered by—

VAIDIALINGAM, J —In this appeal by special leave, the short question that arises for consideration is as to

(1) L R (1909) A C 466.

whether the appellant railway is entitled to claim exemption from payment of terminal tax under item 2 of Sch B of the rules framed by the Municipal Board of Saharanpur The appellant will be so entitled if it is held to be a railway as contended on behalf of the appellant

The High Court of Allahabad in its order and judgment under appeal has held that the appellant is not a railway but only a tramway and as such not eligible for exemption, from the tax, in question The short facts leading to this appeal may now be briefly set out The appellant is a limited liability company and it runs a railway between Shahdara in Delhi and Saharanpur in the State of Uttar Pradesh—a distance of about 95 miles or 148 865 kilometers The appellant company also operates within the municipal area of Saharanpur The company was originally registered as a tramway, under the Indian Tramways Act, 1886 (Act XI of 1886) (hereinafter called the Tramways Act) on 20th November 1905 By Notification No 5752 dated 5th July 1907 the Governor General in Council extended to the appellant company the whole of the Indian Railways Act, 1890 (Act I of 1890) (hereinafter called the Railways Act), excepting the provisions of s 135

The Municipal Board of Saharanpur the first respondent herein imposes a terminal tax under the provisions of s 128(1) (xiii) of the United Provinces Municipalities Act 1916 as amended by Act I of 1918 Under the said Act the first respondent has prohibited the importation of goods within the local limits of the Saharanpur Municipality by rail until the tax leviable thereon or in respect thereof has been paid in accordance with the provisions of the Act and the Rules The Board has also framed rules for the assessment and

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collection of Terminal Tax as authorized by the Government Notification No 856/XI D T 3 dated 1st May 1919 The rules have been amended as per another Notification No 5965/XI D T 3 dated 21st September 1939

Item 2 of Sch B of these rules provides for a list of articles being exempted from payment of Terminal Tax The said item is as follows

> Railway stores and materials which are required for use on Railways, whether in construction maintaining or working the same and which are not removed outside the Railway land boundaries but not stores imported into Municipal limits for purchase and consumption by Railway employees nor stores with which Railway Co operative Stores are stocked for sale to Member

It is the claim of the appellant that, till 1961 the first respondent has never imposed any terminal tax on railway stores and materials required for use on the railway of the appellant company for the purposes mentioned in item 2 of Sch B But for the first time in January 1962, according to the appellant the first respondent imposed tax on such stores and attempted to make the appellant liable The appellant company protested against this levy, on the ground that, it being a railway, was entitled to the exemption provided in respect of railway stores and materials, which are required for use on railways But the first respondent by its order dated 11th October, 1962, overruled the appellant's objections in this regard An appeal, taken by the appellant company, to the Additional District Magistrate Saharanpur under s 160 of the Municipalities Act read with the relevant Rules did not meet with success as the said Magistrate rejected the appeal, by his order 25th May, 1965

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Vardia Iengam J

The appellant company filed Civil Miscellaneous Writ No 3567 of 1965 in the High Court of Allahabad, challenging the levy of terminal tax and claimed exemption under item 2 of Sch B referred to earlier The learned Judges of the Allahabad High Court by their judgment dated 10th September 1965 dismissed the writ petition They were of the view that the appellant company was not a railway, but a tramway constructed under the Tramways Act In this connection the learned Judges adverted to the Railways Act, which defines both the terms tramway and railway' It is their view that when a tramway and a railway are both separately defined in an Act a tramway cannot also be a railway

The learned Judes of the High Court then referred to the fact that so far as the appellant company was concerned the Central Government had not applied s 135 of the Railways Act though all the other provisions of that Act had been applied They further held that a mere application of the Railways Act in whole or in part to a tramway will not convert the tramway into a railway and that in order to be a railway it has to be opened in accordance with the provisions contained in Chap IV of the Railways Act So they concluded that inasmuch as the appellant railway was not opened in accordance with the provisions of the Railways Act it had been from its inception and it continued to be not a railway but only a tramway On this line of reasoning the High Court further held that in the rules framed by the Municipal Board the expression railway must be intended to refer only to railways coming under the Railways Act and could not include a tramway like the appellant opened under the Tramways Act In consequence the claim of the appellant, for exemption was, according to the High Court rightly rejected by the authorities The

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result was the dismissal of the appellant's writ petition by the High Court

We shall now refer to the main features of the appellant company The appellant railway is worked by steam or other mechanical power and is not wholly within a Municipal area The railway line comprises narrow gauge track of 2' 6" guage and consists of main line transportation sidings and commercial sidings The line passes through four districts *viz* Saharanpur Muzaffarnagar Meerut and Delhi within the provinces of Uttar Pradesh and Delhi The system has about 100 level crossings comprised of Special Class A class B class and C class Some of the level crossings are provided with signalling and interlocking arrangements and the system takes in 406 bridges and 26 railway stations in all The bridges and culverts are maintained in accordance with the instructions contained in Way and Works Manual of the Indian Railways and the railway stations are fitted with Morse speakers and instruments for working trains as per general rules applicable to all railways There is annual inspection of the railway line by the Additional Commissioner of Railways Safety appointed by the Government to inspect Indian Railways There are arrangements for through booking of goods and passengers From what is stated above it will be seen that the appellant company is a railway as commonly understood and described in ordinary parlance

The Tramways Act was an Act passed to facilitate the construction and to regulate the working of Tramways S 3(5) defines tramway as follows

> tramway means a tramway having one two or more rails and includes—
>
> (a) any part of a tramway or any siding turnout connection, line or track belonging to a tramway

(*b*) any electrical equipment of a tramway and

(*c*) any electric supply line transmitting power from a generating station or sub station to a tramway or from a generating station to a sub station from which power is transmitted to a tramway

The expression order under s 3(6) means an order authorizing the construction of a tramway under the Act and includes a further order substituted for or amending extending or varying that order There are various other provisions in this Act relating to the construction and maintenance of tramways orders authorizing the construction of tramways and other incidental matters

The Railways Act was an Act to consolidate amend and add to the law relating to Railways in India S 3(1) defines tramway as meaning a tramway constructed under the Tramways Act or any special Act relating to tramways S 3(4) defines railways and is as follows

railway means a railway or any portion of a railway for the public carriage of passengers animals or goods and includes—

(*a*) all land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway

(*b*) all lines of rails sidings or branches worked over for the purposes of or in connection with a railway

(*c*) all stations offices warehouses wharves workshops manufactories fixed plant and machinery and other works constructed for the purposes of or in connection with a railway and

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(d) all ferries ships boats and rafts which are used on inland waters for the purposes of the traffic of a railway and belong to or are hired or worked by the authority administering the railway

This Act also contains various provisions relating to the opening of railways inspection of railways construction and maintenance of works working of railways and several other incidental matters S 135 occurring in Chap X containing supplemental provisions relates to taxation of railways by local authorities That section reads

> 135 Notwithstanding anything to the contrary in any enactment or in any agreement or award based on any enactment, the following rules shall regulate the levy of taxes in respect of railways and from railway administrations in aid of the funds of local authorities namely —
>
> (1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Central Government has by notification in the official *Gazette*, declared the railway administration to be liable to pay the tax
>
> (2) While a notification of the Central Government under cl (1) of this section is in force the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification or in lieu thereof such sum if any as an officer appointed in this behalf by the Central Government may having regard to all the circumstances of the case, from time to time determine to be fair and reasonable

(3) The Central Government may at any time revoke or vary a notification under cl (1) of this section

(4) Nothing in this section is to be construed as debarring any railway administration from entering into a contract with any local authority for the supply of water or light or for the scavenging of railway premises, or for any other service which the local authority may be rendering or be prepared to render within any part of the local area under its control

(5) Local authority in this section means a local authority as defined in the General Clauses Act 1887, and includes any authority legally entitled to or entrusted with the control or management of any fund for the maintenance of watchmen or for the conservancy of a river

The point to be noted in this provision is that unless a notification has been issued by the Central Government under sub s (1) of s 135 declaring a railway administration to be liable to pay a tax a railway administration shall not be liable to pay any tax in aid of the funds of any local authority S 146 giving power to the Government to extend the Railways Act to certain tramways is as follows

146 (1) This Act or any portion thereof may be extended by notification in the official *Gazette*—

(*a*) to any tramway which is wholly within a municipal area or which is declared not to be a railway under cl (20) of article 366 of the Constitution by the State Government and

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(b) to any other tramway by the Central Government

(2) This section does not apply to any tramway not worked by steam or other mechanical power

We have already pointed out that all the provisions of the Railways Act, except s 135 have been extended to the appellant company

The next enactment to be referred to is the Indian Railway Companies Act, 1895 (Act X of 1895) which provided for the payment by railway companies, registered under the Indian Companies Act 1882 of interest out of capital during construction S 2(1) defines railway as meaning a railway as defined in s 3 cl (4) of the Railways Act S 3 provided for a railway company paying interest on its paid up share capital out of capital for the period and subject to the conditions and restrictions contained in that section There are other consequential provisions in this Act

The Indian Tramways Act, 1902 (Act IV of 1902) was one to apply the provisions of the Indian Railway Companies Act 1895, to certain tramway companies The preamble to this Act IV of 1902, stated that it was expedient to apply the provisions of the Indian Railway Companies Act 1895 to companies formed for the construction of tramways not differing in structure and working from light railways This preamble will clearly show that even as early as 1902 the Legislature considered that though certain systems were called tramways substantially they did not differ in structure and working from light railways

The expression railway is defined, in s 311(2) of the Government of India Act 1935 as following

> railway includes a tramway not wholly within a municipal area

It is to be noted that if a system though a tramway is wholly not within a municipal area that system will be a railway Entry 58 of List I (Federal List) of the Seventh Schedule to the 1935 Act was

> Terminal taxes on goods or passengers carried by railway or air taxes on railway fares and freights

It is again to be noted that under this Entry in respect of a tramway which is not wholly within a municipal area and which will therefore be a railway under s 311(2) the levy of terminal tax on goods or passengers carried by such a system will be within the competence of the Federal Legislature

Under Art 366(20) of the Constitution the expression railway is dealt with as follows

> railway does not include—
>
> (*a*) a tramway wholly within a municipal area, or
>
> (*b*) any other line of communication wholly situate in one State and declared by Parliament by law not to be a railway

It may be noted here that the appellant s system does not come within the exclusions mentioned in cl (*a*) or (*b*) of this definition Entry 89 of list I (Union List) of the Seventh Schedule to the Constitution is as follows

> Terminal taxes on goods or passengers carried by railway sea or air taxes on railway fares and freights

It may be noted that the competent legislative body to levy terminal taxes on goods or passengers carried by the appellant s system which will be a railway under Art 366(20) is the Parliament

The only other Act to be referred to is the Railways (Local Authorities Taxation) Act 1941 (Act XXV of

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1941) which was an Act to regulate the extent to which railway property shall be liable to taxation imposed by an authority S 3(1) of that Act provided that a railway administration shall be liable to pay any tax in aid of the funds of any local authority if the Central Government by notification in the official *Gazette*, declared it to be so liable S 4 provided for the Central Government by notification in the official *Gazette* revoking or varying any notification issued under s 135(1) of the Railways Act

The learned Additional Solicitor General appearing for the appellant pointed out that the expression railway had not been defined in the United Provinces Municipalities Act or in the Terminal Tax Rules In the absence of any special definition contained in the provisions granting the exemption in question the expression railway occurring in item 2 of Sch B of the Terminal Tax Rules must bear the commonly understood meaning of a carriage of passenger and goods on iron rails By virtue of the definition in s 311(2) of the 1935 Act and the provisions corresponding to it in the Constitution *viz*, Art 366(20) the appellant's system though registered under the Tramways Act was a railway The mere fact that s 135 of the Railways Act had not been applied to the appellant's system is not a decisive factor against the appellant as had been assumed by the High Court In view of the various features of the appellant's system and pointed out by us earlier it is argued that the appellant's system is a railway both in law and in fact It satisfies all the ingredients of a railway and if that is so the appellants are entitled to the exemption provided for under item 2 of Sch B of the Terminal Tax Rules

On the other hand Mr GARG, learned counsel appearing for the respondent Board pressed before us

for acceptance the various reasons given by the High Court for holding that the appellant is not entitled to claim the exemption In particular counsel point ed out that there were two different enactments, one dealing with tramways and the other with railways, being the Tramways Act and the Railways Act respec tively Therefore there were two different systems under two different names namely tramways and railways which was clearly known to the authorities concerned, at the time when the Terminal Tax Rules were framed and so when the expression railway was used in the exemption clause it must have been the intention of the framers of the Rules to bring, within its ambit, only the railways constructed under the Railways Act The appellant s system though called a railway and though it might have all the features of a railway it is pointed out nevertheless that inasmuch as it has been constructed under a different enactment, viz, the Tramways Act it cannot be treated as a rail way for the purposes of the exemption Counsel also stressed that s 135 of the Railways Act had not been applied to the appellant

We are not impressed with the approach made by the learned Judges of the High Court, for negativing the claim for exemption made by the appellant It must be borne in mind that the expression railway has not been defined either in the concerned Municipalities Act or the Rules if such is the case the definition must hold the field Going by the definition of the expression railway contained in s 311(2) of the Gov ernment of India Act 1935 and the corresponding provision in Art 366(20) of the Constitution the ap pellant s system is a railway All the provisions of the Railways Act have been extended to the appellant excepting s 135 In our opinion if the appellant is a railway otherwise, the mere fact that the provisions

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of s. 135, of the Railways Act, have not been applied is of no consequence. We have already referred to the fact, which is not in dispute, that the appellant's railway passes through four districts in U. P. and Delhi and that it has got all the features of a railway as ordinarily understood.

In this connection we may refer to certain English decisions where the claim made on behalf of a system for being taxed at a concessional rate had come up for consideration.

In *Blackpool And Fleetwood Tramroad Company* v *Thornton Urban Council* (1) the Court of Appeal had to consider as to how far the Blackpool and Fleetwood Tramroad Company, the appellant before them was entitled to the assessment at a lower rate under s. 211 (1)(*b*) of the Public Health Act 1875 (38 and 39 Vict. c. 55). The material portion of that section was

> the occupier of any land ... used only as a canal ... or as a railway constructed under the powers of any Act of Parliament for public conveyance shall be assessed in respect of the same in the proportion of one fourth part only of the net annual value thereof.'

The question was as to whether the appellant, in that case was a railway to whom the said provision would apply. The appellant company had constructed and maintained a tramroad connecting two systems of tramways, under the local Acts of 1896 and 1898. Various provisions of the Railways Clauses Consolidation Act, 1845, had been applied to the tramroad. The tramroad in that case was on rails laid on sleepers fenced off from adjoining land, excepting at the level crossings of roads. The Divisional Court had rejected the claim of the appellant, but the Court of Appeal held that

(1) L.R. (1907) 1 K.B.D. 568

the tramroad was land used only as a railway construct ed under the power of an Act of Parliament for public conveyance within the meaning of s 211(1)(*b*) of the Public Health Act 1875 and that the company was consequently entitled to be assessed in respect of the said railway at one fourth of its net annual value The appellants contended that the tramroad was and ould only be worked as a railway and was in fact and in law used as a railway and in consequence they urged that the tramroad maintained by them is land used only as a railway The Court of Appeal noted that the rails were raised and laid on sleepers just as a railway is laid and that was the main distinction be tween the appellant s system and a tramway which ran along public streets and in grooved rails No doubt it was pointed out for the Urban Council that the appellant company had been incorporated under the Tramways Act and the very fact that certain pro visions of the Railway Clauses Consolidation Act were applied to the appellant s system showed that the ap pellant was not a railway The Court of Appeal held that it was impossible to distinguish the piece of tram road owned by the appellants from a railway and that the exemption provided for in the Public Health Act applied to the tramroad of the appellants as it would, to any ordinary railroad passing through parts where it was not deriving the full benefit from the district rates in those parts The Court of Appeal also reject ed the contention of the Urban Council that the tram road owned by the appellants could be treated as a railway only for particular purposes and not for the purpose of claiming the exemption under the Public Health Act because according to the Court of Appeal, a reading of s 211(1)(*b*) of the Public Health Act, showed that it applied to land used as a railway *i e* constructed as a railway in fact

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Vaidialingam J

This decision was taken in further appeal before the House of Lords whose decision is reported as *Thornton Urban Council* v *Blackpool And Fleetwood Tramroad Company* (1) and the decision of the Court of Appeal was confirmed In the course of the judgment after referring to s 211 of the Public Health Act Lord MACNAGHTEN observed, at p 267

> Now it cannot be denied that the rails on which the tramcars run, with the embankment or foundation on which they rest, and everything that supports them, do form a road or way and that that road or way was constructed under parliamentary powers for public conveyance Is it a railway ? There is nothing in the Public Health Act 1875 or in the earlier Acts in which the same provision is found to confine the word railway as used in those Acts to a particular kind of railway, or to limit the generality of the expression in any way

His Lordship further observed at p 268

> It seems to me that if it is a railway in fact, not differing from other railways in any material particular it is none the less a railway because the promoters in their special Act chose to call it a tramroad —a very convenient term to use for the title of their Act and the name under which they sought incorporation Nor is it the less a railway because some only of the sections of the Railways Clauses Consolidation Act are incorporated in the special Act or because if one did not know what the thing really was, the language used for the purpose of applying the sections which are incorporated might seem to import that it was not, properly speaking a railway at all You must look at the special Act to see that it confers the appropriati

(1) L R (1909) A C 984

powers of construction Everything else in the Act is, I think beside the question which this House has now to determine

In our opinion the observations of the House of Lords extracted above are opposite to the case on hand We have already pointed out that neither the Municipal Act nor the Terminal Tax Rules give any special definition of the expression railway and, so far as we could see there is nothing in the said Act or the Rules to indicate that the word railway in item 2 of Schedule B, is used only to refer to a railway registered under the Railways Act or to limit the generality of the expression railway in any way Under those circumstances, if the appellant is a railway in fact as commonly understood—there does not appear to be any serious controversy on that point—it will be a railway, nothwithstanding the fact that it is registered as a tramway, under the Tramways Act The legislature itself has applied the various provision of the Railways Act to the appellant and the appellant also satisfies the definition of a railway under the Government of India Act 1935 and the Constitution The provisions of the Indian Railway Companies Act 1895 have also been applied to the tramways constructed, under the Tramways Act by the Indian Tramways Act of 1902 The second preamble to the last mentioned Act clearly shows that the tramways to which the Indian Railway Companies Act was made applicable do not differ in structure and working from railways

The object underlying the exemption under item 2 of Sch B to the Terminal Tax Rules is also not far to seek The railways pass through areas where it is not deriving the full benefit of all the amenities provided by the Municipal Boards Therefore in our opinion the appellant satisfies the definition of a rail

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way so as to be entitled to the exemption provided under item 2 of Sch B

Before we close the discussion we will also refer to the decision of the House of Lords in *Tottenham Urban Council* v *Metropolitan Electric Tramways, Ltd* (1) The same question regarding the eligibility of a tram way for exemption under s 211(1)(*b*) of the Public Health Act 1875 came up for consideration in that case From the judgment, it will be seen that the company were working, as a connected system a tram way and a light railway which were constructed in and along certain public streets and roads in the district of the urban Council The tramway was constructed under the Tramway Acts and Orders and the railway under the Light Railways Act 1896 Both were identical as to the mode of construction and materials used The claim of the company in respect of the railway as such for assessment at a lower rate was accepted, but so far as the tramway was concerned the House of Lords held that it is not a railway within the meaning of s 211(1)(*b*) of the Public Health Act 1875 The research given by the House of Lords for not accepting the claim of the tramway was that in the great bulk of public legislation relating to railways the legislation has universally been understood and interpreted by Courts as applying only to that which is popularly known as a railway and not to that which is popularly known as a tramway And special emphasis is laid by the House of Lords that the legislature has used the word railways and not railways and tramways in s 211 of the Public Health Act 1875

We are only adverting to this decision to show that on the basis of an interpretation placed by the Courts the House of Lords held that the word railways in the Public Health Act 1875 will not take in tramways

(1) R I. (1913) A C 702

But, no such circumstances as pointed out by the House of Lords, in the said decision exist in the present case before us On the other hand the position is exactly the opposite as will be seen from the Government of India Act 1935, and the Constitution Even applying the popular test adopted by the House of Lords, in this case the appellant is undoubtedly a railway

In our opinion, the principles laid down by the House of Lords in *Thornton Urban Council* v *Blackpool and Electwood Tramroad Company* (1) apply to the particular matter on hand and we hold that the appellant being a railway, is entitled to the exemption under item 2 of Sch B to the Terminal Tax Rules in question

We accordingly allow the appeal and set aside the judgment of the High Court and further direct that a writ will issue, as prayed for by the appellant The appellant will be entitled to its costs from the first respondent, both in this Court and in the High Court

Appeal allowed

(1) L R (1909) A C 284

APPELLATE CIVIL (F B)

Before Mr Justice Oak, Mr Justice Dwivedi and Mr Justice Gangeshwar Prasad

1967

April 27

KUNWAR BAHADUR APPELLANT

v

THE UNION OF INDIA AND OTHERS RESPONDENTS

Constitution of India, *Art* 311(2)—*Proviso (a)—Termination of employee's services on conviction—No opportunity to show cause given—Appeal against order of conviction allowed—Held employee entitled to benefit of Art* 311(2)

Where the services of an employee were terminated on his conviction by a Special Judge (Anti Corruption) without affording him any opportunity to show cause as provided in Art 311(2) but subsequently the employee's appeal against his conviction was allowed *held* that the respondents would not be entitled to the benefit of sub-cl (a) of the proviso to Art 311(2) and that the employee is entitled to the protection of cl (2) of Art 311 of the Constitution

First Appeal No 10 of 1964 against the judgment and decree of Jahnavi Prasad, Civil Judge, Allahabad in Suit No 5 of 1963 decided on 14th September 1963

M P Singh, for the Appellant

N D Pant, for the Respondents

OAK, J —The following question of law has been referred to this Full Bench

> Would the provisions of Art 311(2) of the Constitution of India apply to the case of the appellant in the circumstances of the present case?

The facts of the case are these Kunwar Bahadur was employed as a clerk in the Evacuee Property Department On 17th May, 1956 he was convicted by a Special Judge (Anti Corruption) for taking a bribe On 21st May 1956 the Deputy Custodian of Evacuee

Property Allahabad passed an order terminating Kun war Bahadur s services with effect from 17th May 1956 No opportunity to show cause as provided in Art 311 (2) of the Constitution of India was given to him before passing the order dated 21st May 1956 Kunwar Bahadur appealed against the order of conviction The appeal was allowed by this Court on 9th April 1957 Kunwar Bahadur nstituted a suit in the Court of the Civil Judge Allahabad for a declaration that the order of removal of the plaintiff from service is void and the plaintiff continues in service He also claimed the re covery of arrears of pay up to the date of the suit The plaintiff s suit was dismissed by the trial Court Kun war Bahadur plaintiff has appealed to this Court

When the appeal came up for hearing before a Divi sion Bench of this Court learned counsel for the parties advanced arguments on the question whether the plain tiff was entitled to the protection of cl (2) of Art 311 of the Constitution On finding that there is some conflict of opinion on this question the Division Bench referred the question of law quoted above to a Full Bench

The question for consideration is whether the plain tiff appellant is entitled to the protection of cl (2) of Art 311 of the Constitution Cl (2) of Art 311 states

> No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him
>
> Provided that this clause shall not apply—
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge

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Gok J

(b)
(c)

According to Mr N D Pant appearing for the defendants respondents the present case is covered by sub cl (a) of the proviso Consequently the plaintiff cannot get the benefit of cl (2) of Art 311 According to Mr M P Singh appearing for the plaintiff appellant the present case is not covered by sub cl (a) of the proviso So the plaintiff is entitled to the benefit of cl (2) of Art 311

In *M S M Railway Co* v *Ranga Rao* (1) it was held that if a railway company had the right to dismiss its servant when he was convicted it could not be compelled to take him back into its employment when the conviction was set aside at some later date as a result of revision proceedings

Similarly in *N W R Johnson* v *General Manager, B N Railway* (2) it was held that once a government servant is dismissed upon a ground which is valid at the time of dismissal it does not follow that he must be taken back if later on that ground disappears Under r 1706 R a railway servant is liable to dismissal from service upon conviction by a criminal Court and the railway company cannot be compelled to take him back into its employment when the conviction is set aside in appeal at some later date

It will be seen that *Ranga Rao's* case (1) was decided by Madras High Court long before the commencement of the Constitution of India The decision by Calcutta High Court in *Johnson's* case seems to be based largely on the relevant provisions of the Railway Code So, these two decisions are not of much help for understanding the true scope of Art 311 of the Constitution

In *U P State* v *Mohammad Nooh* (3) their Lordships of the Supreme Court observed on page 95

(1) A I R 1940 Mad 289 (2) A I R 1955 N U C 1798 Cal
(3) A I R 1958 S C 86

under the Indian Law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is merely one of dismissal There is nothing in the Indian Law to warrant the suggestion that the decree or order of the Court or tribunal of the first instance becomes final only on the termination of all proceedings by way of appeal or revision The filing of the appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective

In *Dilbagh Rai* v *Divisional Superintendent, Northern Railway* (1) it has been held by GROVER, J that if a person is acquitted by a Court of law then it cannot be said that there is any conviction in the sense in which it is used under proviso (*a*) to Art 311(2) of the Constitution

In *R S Das* v *Divisional Superintendent* (2) it was held by TANDON, J that a proceeding will not be said to have led to a government servant's conviction if it has not resulted ultimately in conviction or as a consequence of appeal has ended in an acquittal

In *Union of India* v *R Akbar Sheriff* (3) it was held that immunity of a civil servant from dismissal, etc without compliance with the provisions of Art 311(2) is taken away under proviso (*a*) to Art 311(2) in a case where the dismissal or removal from service or reduction in rank is based upon the ground of conduct which resulted in his conviction on a criminal charge Once the conviction is set aside or quashed the dismissal order must fall to the ground An acquittal of a person of a criminal charge by a higher Court setting aside the conviction passed by a subordinate or an inferior

(1) A I R 1969 Pun 401 (2) A I R 1960 All 538
(3) A I R 1961 Madras 486

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Oak J

Court is tantamount to the person not having been convicted at all

In *Dhanji Ram* v *Union of India* (1) it was held that the word conviction used in proviso (*a*) to Art 311(2) can have only one meaning that the person convicted must have been convicted finally

In *Tarni Kumar* v *Chief Commercial Superintendent, Eastern Railway* (2) it was held that when a conviction is set aside by the appellate Court the position at law would be as if the government servant was never convicted at law and the dismissal not having been made in conformity with Art 311(2) became a nullity from the date of acquittal on appeal

Divisional Superintendent, Northern Railway v *Ram Saran Das* (3) is a decision by a Division Bench of this Court N U BEG, J (as he then was) observed on page 337

> there can be no manner of doubt that the words led to his conviction on a criminal charge can only mean a criminal charge which has finally resulted in the conviction of the person proceeded against

There is thus overwhelming authority in support of Mr *M P Singh's* contention that if conviction is set aside in appeal Government cannot claim the benefit of sub cl (*a*) of the proviso to Art 311(2)

Mr *N D Pant* urged that all that has to be established for purposes of sub cl (*a*) of the proviso is that the order of dismissal followed an order of conviction recorded by a Criminal Court The language of sub cl (*a*) lends some support to this contention But in interpreting a constitutional provision literal construction is not always helpful One must understand the principle underlying the constitutional provision

(1) A I R 1965 Pun 158 (2) A I R 1965 Cal 75
(3) A I R 1961 All 336

Art 311 appears in Part XIV of the Constitution Part XIV deals with Services under the Union and the States Framers of the Constitution were anxious that Government employees should have a feeling of security of service Government servants have therefore been given an assurance in Art 311(2) that no drastic action will be taken against them without giving them a reasonable opportunity of showing cause against the proposed punishment To this rule, there are three exceptions The three exceptions have been enumerated in sub cls (*a*) (*b*) and (*c*) of the proviso In the present case we are concerned with the exception recognised by sub cl (*a*) of the proviso All that a civil servant can reasonably claim is a reasonable opportunity of proving his innocence Opportunity for establishing innocence given to an accused in a criminal trial is at least as liberal as that given to a civil servant in a departmental enquiry If the civil servant has been convicted by a criminal Court, there is not much point in holding a departmental enquiry That is the principle underlying sub cl (*a*) of the proviso to Art 311(2) But sub cl (*a*) implies that the civil servant's conviction stands If the conviction is ultimately set aside in appeal or in revision it cannot be said that the civil servant's misconduct has been established before the criminal Court In such a case the civil servant can properly claim a departmental enquiry under Art 311 (2)

Mr *N D Pant* urged that if the interpretation suggested by Mr M P Singh is accepted there would be inordinate delay in the disposal of departmental proceedings In every case Government will have to wait for the result of an appeal or revision Now it is always open to Government to pass an order of dismissal or removal from service immediately after a criminal Court records conviction In that case the administra-

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tion runs the risk of the conviction being later set aside in appeal or revision It is for the administration to decide whether in a particular case it should pass an order of dismissal or removal immediately after conviction by the trial Court, or wait for the result of a possible appeal or revision Such considerations of expediency can have little bearing on the interpretation of Art 311 of the Constitution

The impugned order dated 21st May 1956 ran thus

> Having been convicted by the District and Sessions Judge Allahabad acting as a Special Judge the services of Sri Kunwar Bahadur are terminated with effect from the date of conviction, i e 17th May, 1956

Mr *N D Pant* conceded that although the order purports to be an order terminating the plaintiff s services the order is in substance an order removing Kunwar Bahadur from service Art 311 is therefore attracted The only question is whether the respondents can get the benefit of sub cl (*a*) of the proviso or not As explained above although the plaintiff was initially convicted by the trial Court on 17th May, 1956, that conviction was ultimately set aside in appeal on 9th April, 1957 The respondents are not, therefore entitled to the benefit of sub cl (*a*) of the proviso

My answer to the question of law referred to the Full Bench is this In the circumstances of the present case the respondents are not entitled to the benefit of sub cl (*a*) of the proviso to Art 311(2) and the plaintiff appellant is entitled to the protection of cl (2) of Art 311 of the Constitution

DWIVEDI, J —The question referred to us involves the interpretation of cl (*a*) of the proviso to Art 311(2) of the Constitution It is a substantial reproduction of cl (*a*) of the proviso to s 240(3) of the Government

of India Act, 1935 Cl (*a*) of the proviso to s 240(3) was based on the Report of the Joint Committee on Indian Constitutional Reform The Committee had recommended that no civil servant should be liable to dismissal or reduction in rank without being given formal notice of any charge made against him and an opportunity of defending himself 'unless he has been convicted in a criminal court (1)

This is the short history of the genesis of cl (*a*) of the proviso to Art 311(2) The true import of cl (*a*) should be discovered from its language, context and scheme

The key words in cl (*a*) are on the ground of *con duct* which has *led to his conviction* on a criminal charge Firstly, the conduct for which the servant is being dismissed, removed or reduced in rank should be the basis of his conviction Secondly the conduct should result in his conviction One of the meanings of the verb ' to lead to ' is to have as a result (2) If this meaning is attributed to the words led to ' in cl (*a*), then the conduct should result in his conviction If that is so as I think, then where the conviction is set aside by a court in appeal or revision, it is difficult to say that the conduct has *resulted* in or led to his con viction

Let us now examine the context and scheme of cl (*a*) It is associated with cls (*b*) and (*c*) of the proviso cl (*b*) dispenses with the hearing requirement of Art 311(2) when it is impracticable for instance when the em ployee is absconding Cl (*c*) dispenses with hearing when it is inexpedient in the interest of the security of the State These are judicially recognised areas where the *audi alteram partem* rule does not operate (3) In the context of cl (*b*) and (*c*) cl (*a*) appears to exclude

(1) Report of the Joint Committee on Indian Constitutional Reform Vol I page 340

(2) Shorter Oxford Dictionary (1933) page 1119

(3) S A de Smith Judicial Review of Administrative Action (1968 Edn) pages 119 and 191

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Dwivedi J

the said rule because after conviction in a court of law it is considered to be *inessential* It is supposed that this area exclusion inheres in the principle of natural justice which assures the essence of justice or rational justice The reason for the exclusion of hearing is that the misconduct of the employee has already been proved in a regular trial in the court of law But this reason disappears where the conviction is upset in appeal or revision The finding of guilt is then gone, and the misconduct remains unproved The reason disappearing the exclusion of hearing becomes unjust and unfair

During arguments a question was put to Sri Pant Can the superior departmental authority set aside the punishment based on conviction if it is upset in appeal or revision? His reply was in the affirmative I fail to understand why the punishment should stand if the conviction is set aside in appeal or revision while no departmental proceeding against the punishment is pending

Sri *Pant* strenuously pressed upon us that our view will delay the employee s day of judgment until the appeal or revision against his conviction has been decided I am not quite certain that it is the inevitable result of our view But that aside the argument is the familiar old argument of administrative convenience It was laid to rest about two decades ago by Lord Atkin with this eloquent epitaph Convenience and justice are often not on speaking terms *General Medical Council V, Spackman* (1) So no more be said of it

Having regard to the language context and scheme of cl (*a*) and to its serious impact on the employees right to livelihood I concur with the opinion of Sri Justice Oak

(1) 1943 A C 627

GANGESHWAR PD J —I have had the advantage of reading the judgments of Mr Justice OAK and Mr Justice DWIVEDI and I am in respectful agreement with them I, however wish to add a few words in regard to the main argument advanced on behalf of the Union of India by Sri *N D Pant*

It was contended that the applicability of Art 311(2) of the Constitution to the case of the appellant has to be determined with reference to the state of things existing at the time of his dismissal, and since the appellant was at that time a person who stood convicted on a criminal charge he could be dismissed on the ground of the conduct for which he had been convicted, without being given an opportunity of showing cause against the action proposed to be taken in regard to him This contention appears to ignore an essential feature of a conviction which is liable to be set aside

So long as a conviction remains liable to be set aside it cannot be said to be determinate in its nature and its legal consequences, whether the conviction is already in question before a superior court or not The state of things created thereby is liable to change and, naturally, an order of dismissal which seeks to justify its non compliance with the requirement of Art 311(2) on the basis of such a conviction stands upon an insecure foundation The order cannot have a higher validity than the conviction from which it derives its precarious justification and it must remain subject to the ultimate shape which is given to the state of things by the order of the superior court before which the conviction is challenged If the conviction is set aside the state of things is made to undergo a change not merely from the date of the setting aside of the conviction but from the date of the conviction itself In deed a finding of guilt recorded against a person can

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Dwivedi J

not be said to have been reversed and his conviction can not be said to have been effectively set aside if the reversal and the setting aside were to operate only from the date when the order to that effect is made and the person concerned were to be, even thereafter, regarded as having remained guilty and convicted till then Such an order, whenever it may come to be made, has the effect of wiping out the finding of guilt and the conviction altogether Whether a person was entitled to the safeguard provided by Art 311(2) and whether he has had the benefit of that safeguard are justiceable matters and it should, therefore, follow that when a court is called upon to decide these matter it has to see whether, in the light of the final outcome of the criminal proceeding in respect of the conduct for which the said person was dismissed it can be said that the proceeding had led to his conviction If it is found that the conviction was subsequently set aside, it must, in my opinion, be held that at no point of time was the person concerned a person whose conduct, on the ground of which he was dismissed from service had led to his conviction

Art 311(2) of the Constitution would, therefore, apply to the case of the appellant

BY THE COURT —Our answer to the question of law referred to the Full Bench is as follows

> In the circumstances of the present case, the respondents are not entitled to the benefit of sub clause (*a*) of the proviso to Art 311(2), and the plaintiff appellant is entitled to the protection of clause (2) of Article 311 of the Constitution

Question answered

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Bachawat, the Hon ble Mr Justice Shelat and the Hon ble Mr Justice Bhargava

1965
May 6

M/s HULAS RAI BAIJ NATH APPELLANT

v.

FIRM K B BASS AND Co RESPONDENT

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Code of Civil Procedure, *(Act V of)* 1908 *O* 23 *r* 3—*Application for withdrawal of suit after issues and some evidence adduced—Whether and when to be allowed*

In the absence of any right having vested in the defendant to continue the suit e g passing of a preliminary decree for rendition of accounts or specific case of set-off or counter-claim the plaintiff has subject to his liability for costs to the defendant the unqualified right to withdraw the suit at any stage (in this case after the issues had been framed and some evidence had been led in the case) provided he does not seek to do so with permission to file a fresh suit.

A defendant cannot be said to have claimed a set-off or set up a counter-claim where he alleges in his written statement to the suit for rendition of accounts that accounts had been fully explained to the plaintiff wherein a certain sum of money had been found due to him from the plaintiff that there was no occasion for rendition of accounts and that the suit was not fit to proceed according to law and pleads simply that if the Court has jurisdiction and rendition of accounts be found necessary a decree for such amount as may be found due to the defendant from the plaintiff may be passed in his favour together with costs and interest

Seethai Achi v *Mevappa Chettiar* (1) explained

Quare —Whether the court is bound to allow withdrawal of a suit to a plaintiff after the accrual of some vested right in the suit in favour of the defendant?

(1) A I R 1934 Mad 857

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M/s HULAS RAI BAIJ NATH v. FIRM K. B BASS & CO

Civil Appeal No 897 of 1964 from the Judgment and Order dated the 14th November 1961 of the Allahabad High Court in Civil Revision No 686 of 1953

Bishan Narain (*M L Khowaja* with him) for the Appellant.

Niren De (*N V Goswami* and *Yogeshwar Pd* with him), for the Respondent

The following Judgment of the Court was delivered by—

BHARGAVA, J —The respondent firm, K B Bass & Co, instituted a suit on 13th April 1951, for rendition of accounts against the appellant firm, Messrs Hulas Raj Baij Nath, alleging that the appellant was the commission agent of the respondent and that the accounts between respondent as the principal and appellant as the agent had not been settled since the dealings began in the year 1941 onwards Tentatively a sum of Rs 2,100 was claimed in the plaint In the written statement filed on behalf of the appellant, the suit was contested on various grounds, but for the purposes of this appeal, we need mention the pleas taken in only two paras 8 and 11 In para 8, it was pleaded that one Lala Shiva Charan, a partner of the respondent firm had come with a Munim in the month of Agahan last and accounts were fully explained to him as worked out up to Kartik Sudi 15, Sambat 2007 In that statement of account, a sum of Rs 10 677 14 3 was found due to the appellant from the respondent and the representatives of the respondent asked for two months time for making the payment of the amount found due It was thus urged that there was no occasion for rendition of accounts and the plaintiff's suit was not fit to proceed according to law In para 11, the appellant pleaded that if in the opinion of the court the court

has jurisdiction to try the suit and it is necessary to render the accounts it is equitable that a decree for the amount which may be found due to the contesting defendant after rendition of accounts, together with costs and interest be passed in favour of the contesting defendant after necessary court fee being realized from the defendant A number of issues were framed and the case was taken up for recording of evidence on several dates of hearing Some of the issues were even given up during the trial Ultimately on 5th May 1953 after a considerable amount of evidence had been recorded an application was presented on behalf of the plaintiff respondent for withdrawal of the suit The ground given for withdrawal was that the respondent firm was in the charge of one Bhagwat Charan who had colluded with the appellant and litigation was going on between the respondent and Bhagwat Charan for effecting partition of the business Consequently it was difficult to prosecute the suit No prayer was made for permission to file a fresh suit The appellant filed an application objecting to this application for withdrawal The main ground taken for contesting this application for withdrawal was that, in a suit of this nature it is permissible to pass a decree in favour of the defendant if on accounting something is found due to him against the plaintiff and it followed that, if the defendent paid court fee on the amount which was found due to him from the plaintiff his position became that of a plaintiff himself and he became entitled to have the accounting done and to obtain a decree It was urged that the plaintiff s game in withdrawing the suit after protracted duration and considerable expenditure on the part of the defendant was to defeat this right of the defendant The trial Court held that the right of the plaintiff in this suit to withdraw under O 23 r 1 of the Code of Civil Procedure was inherent and such a right could be exercised at any

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M/s Hulas Rai Baij Nath v Firm K B Hari & Co

Bhargava J

time before judgment All that the defendant could claim was an order for costs on his favour The Court, therefore, dismissed the suit, awarding costs of the suit to the appellant The appellant filed a revision in the High Court of Allahabad against this order, with a prayer that the High Court may set aside the order of the trial Court and remand the suit for trial according to law The High Court dismissed the application for revision and the appellant has now come up to this Court in this appeal by special leave

The short question that, in these circumstances falls for decision is whether the respondent was entitled to withdraw from the suit and have it dismissed by the application dated 5th May 1958 at the stage when issues had been framed and some evidence had been recorded but no preliminary decree for rendition of accounts had yet been passed The language of O 23, r 1 sub r (1) C P C, gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit is sought under sub r (2) of that Rule the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject matter under sub r (3) of that Rule There is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it It is, of course possible that different considerations may arise where a set off may have been claimed under O 8 C P C or a counter claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit In the present case the pleadings in paragraphs 8 and 11 of the written statement, mentioned above clearly did not amount to a claim for set off Further, there could be no counter claim, because no provision is shown under which a

counter claim could have been filed in the trial Court in such a suit There is also the circumstance that the application for withdrawal was moved at a stage when no preliminary decree had been passed for rendition of account and in fact the appellant was still contend ing that there could be no rendition of accounts in the suit, because accounts had already been settled Even in para 11, the only claim put forward was that in case the Court found it necessary to direct rendition of accounts and any amount is found due to the appellant, a decree may be passed in favour of the appellant for that amount In this paragraph also, the right claim ed by the appellant was a contingent right which did not exist at the time when the written statement was filed Even if it be assumed that the appellant could have claimed a decree for the amount found due to him after rendition of accounts, no such right can possibly be held to exist before the Court passed a preliminary decree for rendition of accounts It is to be noted that in the case of a suit between principal and agent, it is the principal alone who has normally the right to claim rendition of accounts from the agent The agent can not ordinarily claim a decree for rendition of accounts from the principal and in fact in the suit, the appel lant, who was the agent of the respondent did not claim any rendition of accounts from the respondent In these circumstances, at the stage of withdrawal of the suit no vested right in favour of the appellant had come into existence and there was no ground on which the Court could refuse to allow withdrawal of the suit It is unnecessary for us to express any opinion as to whether a Court is bound to allow withdrawal of a suit to a plaintiff after some vested right may have accrued in the suit in favour of the defendant On the facts of this case, it is clear that the right of the plaintiff to withdraw the suit was not at all affected by any vested

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M/s HUKAM RAI BALI NATH v. FIRM K. B. BASU & CO

Bhargava J

right existing in favour of the appellant and consequently the order passed by the trial Court was perfectly justified

On behalf of the appellant reliance was placed on the views expressed by a Division Bench of the Madras High Court in *Seethai Achi* v *Mevappa Chettiar* (1), where the Court held

> Ordinarily when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff, it will simply say that the suit is dismissed as the plaintiff has withdrawn from it An order as to costs will also be passed But several exceptions have been recognised to this general rule In suits for partition if a preliminary decree is passed declaring and defining the shares of the several parties the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff for the obvious reason that the rights declared in favour of the defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed So also in partnership suits and suits for accounts where the defendants too may be entitled to some reliefs in their favour as a result of the settlement of accounts the withdrawal of the suit by the plaintiff cannot and in the mere dismissal of the suit

We do not think as urged by learned counsel that the learned Judges of the Madras High Court were laying down the principle that in a suit for accounts a defendant is always entitled to relief in his favour and that the withdrawal of such a suit by the plaintiff cannot be permitted to terminate the suit In the context in which that Court expressed its opinion about suits for accounts it clearly intended to lay down that the dismissal of the suit on plaintiff's withdrawal is not to be

(1) A I R 1934 Mad 587

necessarily permitted if the defendant has become entitled to a relief in his favour But such a right if at all can in no circumstances be held to accrue before a preliminary decree for rendition of accounts is passed In fact in mentioning suits for partition and suits for accounts, the Court was keeping in view the circumstance mentioned in the earlier sentence which envisaged that a preliminary decree had already been passed defining rights of parties In any case we do not think that any defendant in suit for rendition of accounts can insist that the plaintiff must be compelled to proceed with the suit at such a stage as the one at which the respondent in the present case applied for withdrawal of the suit

The appeal therefore fails and is dismissed with costs

Appeal dismissed

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Hidayatullah and the Hon'ble Mr Justice Vaidialingam

JAI CHARAN LAL ANAL (APPELLANT)

v

1967

May 5

THE STATE OF U P AND OTHERS

RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT (ALLAHABAD)

U P Municipalities Act, *(II of)* 1916, *sub ss* (3) *and* (5) *of s 87 A No confidence motion against President of the Municipal Board—Period of 7 clear days of notice and not earlier than 30 days for convening meeting—How to be computed—Power of Presiding Officer to adjourn meeting fixed—Whether exercisable before or without actual meeting*

The period of 7 clear days of notice of the meeting for considering no-confidence motion is as provided expressly by s 87 A (3) of the Municipalities Act itself to be computed from the date of the dispatch and not receipt of the registered notice

It is no doubt true that in the expression not less than thirty days both the terminal days have to be excluded but the force of the expression not earlier than thirty days is not the same and it (the latter expression) means that it should not be the 29th day but there is nothing to show that the expression excludes the 30th day from the computation Accordingly where notice of no-confidence motion was delivered to the District Magistrate on 26th October and the date fixed for the meeting was 29th November the interval cannot be said to be earlier than 30 days so as to amount to a breach of the provision in that behalf made by s 87 A (3) of the Municipalities Act

Sm Haradevi v *State of Andhra* (1) over ruled

The power of adjournment vested in the Presiding Officer under s 87 A (5) of the Municipalities Act may be exercised in advance and before or without the actual meeting

Civil Appeal No 199 of 1967 from the Judgment and order dated the 6th December, 1966, of the Allahabad

(1) A I R 1967 A P 229

High Court, in Civil Miscellaneous Writ No 4287 of 1966

A K Sen (*L N Mathur, B Dutta* and *O C Mathur* of *M/s J B Dadachanji & Co* with him), for the Appellant

C B Agarwala, (*O P Rana* with him), for the Respondents Nos 1 to 3

S P Sinha (*M I Khowaja* with him), for the Respondents Nos 5 to 13

The following Judgment of the Court was delivered by—

HIDAYATULLAH, J —This is an appeal by special leave against the judgment and order of the High Court of Allahabad 6th December, 1966 in Civil Miscellaneous Writ Petition No 4287 of 1966

The appellant, Jai Charan Lal Anal was elected as a member of the Municipal Board, Sikandrao in December, 1964 He was later elected as the President of the Board On 26th October, 1966 a notice of intention to move a motion of non confidence in the appellant was presented by certain members of the Board to the District Magistrate, Aligarh The District Magistrate issued notices to the members on 17th November, 1966 fixing 25th November, 1966 as the date for the meeting of the Board to consider the non confidence motion This was done under s 87 A of the U P Municipalities Act, 1916 On 22nd November, 1966, the petitioner filed a petition under Art 226 of the Constitution in the High Court of Allahabad asking that the meeting be stopped The case was listed before the High Court on 1st December, 1966 Before this the meeting of the Board was adjourned to 5th December 1966, under circumstances to which detailed reference will be made presently The High Court directed that the petition should be listed for 6th December, 1966

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JAI CHARAN LAL ASAL v. THE STATE OF U P

Hidayat ullah J

By that date the adjourned meeting was held on 5th December 1966, and the non confidence motion was passed unanimously Ten out of fifteen members who were present voted in its favour and none against it The appellant thereupon asked the High Court to quash the resolution of the Board The High Court by the order under appeal declined to do so on the ground that even if there were some irregularities in calling the meeting the resolution, having been passed by the necessary majority, the case was not fit for the exercise of its discretionary powers

In this appeal the question has been raised that the meeting itself was contrary to the provisions of s 87 A of the U P Municipalities Act and the resolution therefore being *ultra vires* and illegal was void This argument is based upon the procedure which is laid down in s 87 A of the Act We may now refer to those provisions S 87 A deals with motion of non confidence against the President It begins by stating that subject to the provisions of the section such a motion shall only be made in accordance with the procedure laid down in the section Sub s (2) requires that a written notice of intention to make a motion of non confidence on the President must be signed by such number of members of the Board as constitute not less than one half of the total strength of the Board and must be accompanied by a copy of the motion which it is proposed to make and should be delivered in person by any two of the members signing the notice to the District Magistrate This was done Sub ss (3) (4) (5) and (6) then provide as follows

> (3) The District Magistrate shall then convene a meeting for the consideration of the motion to be held at the office of the board on the date and at the time appointed by him which shall not be earlier than thirty and not later than thirty

five days from the date on which the notice under sub s (2) was delivered to him He shall send by registered post not less than seven clear days before the date of the meeting a notice of such meeting and of the date and time appointed therefor to every member of the board at his place of residence and shall at the time cause such notice to be published in such manner as he may deem fit There upon every member shall be deemed to have received the notice

(4) The District Magistrate shall arrange with the District Judge for a stipendiary civil judicial officer to preside at the meeting convened under this section and no other person shall preside there at If within half an hour from the time appointed for the meeting the judicial officer is not present to preside at the meeting the meeting shall stand adjourned to the date and the time to be appointed and notified to the members by that officer under sub s (5)

(5) If the judicial officer is unable to preside at the meeting he may after recording his reasons adjourn the meeting to such other date and time as he may appoint, but not later than fifteen days from the date appointed for the meeting under sub s (3) He shall without delay communicate in writing to the District Magistrate the adjournment of the meeting It shall not be necessary to send notice of the date and the time of the adjourned meeting to the members individually but the District Magistrate shall give notice of the date and the time of the adjourned meeting by publication in the manner provided in sub s (3) "

(6) Save as provided in sub ss (4) and (5) a meeting convened for the purpose of considering a

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Hidayat ullah J

motion under this section shall not for any reason be adjourned '

The contentions of the appellant are based upon the provisions of sub ss (3) and (5) and it is contended that there has been a breach of these provisions and therefore the resolution is void Three arguments in this connection have been raised before us and we shall mention them now The first contention is that the notice which was sent out by the District Magistrate by registered post did not allow seven clear days before the date of the meeting as required by the latter part of sub s (3) In advancing this argument the learned counsel for the appellant contends that the critical date is not the date on which the notice is despatched but the date on which the notice is received Since the notice was despatched on the 17th and presumably reached the next day the learned counsel excludes the date of receipt of the notice and the date of the meeting and says that seven clear days did not intervene In our judgment this is an erroneous reading of the sub-section The sub section says that the District Magistrate *shall send the notice* not less than seven clear days before the date of the meeting and the word send shows that the critical date is the date of the despatch of the notice As the notice was sent on the 17th and the meeting was to be called on the 25th, it is obvious that seven clear days did intervene and there was no breach of this part of the section

The next contention is that the District Magistrate had to convene the meeting for the consideration of the motion on a date which was not earlier than thirty days from the date on which the notice under sub s (2) was delivered to him As the notice was delivered to the District Magistrate on 26th October the learned Counsel contends that the date fixed for the meeting, namely 25th November was earlier than thirty days because according to him the 30th day should be excluded in addi

tion to the date on which the notice was handed In other words the learned counsel wishes to exclude both the terminal days *i e* 26th October and 25th November and wants to count thirty clear days in between He contends that the expression not earlier than thirty days is equal to the expression not less than thirty days and therefore thirty clear days must intervene between the two terminal days In support of his contention the learned counsel relies upon a ruling reported in *Sm Haradevi* v *State of Andhra* (1) in which the expression not earlier than three days was equated to the expression not less than three days that is to say three clear days He also relies upon certain other rulings which deal with the expression not less than so many days In our judgment the expression not earlier than thirty days is not to be equated to the expression not less than thirty days It is no doubt true that where the expression is not less than so many days both the terminal days have to be excluded and the number of days mentioned must be clear days but the force of the words not earlier than thirty days is not the same Not earlier than thirty days means that it should not be the 29th day but there is nothing to show that the language excludes the 30th day from computation In other words although 26th October had to be excluded the date on which the meeting was to be called need not be excluded provided by doing so one did not go in breach of the expression not earlier than thirty days The 25th of November was the 30th day counting from 26th October leaving out the initial day and therefore it cannot be described as earlier than thirty days In other words it was not earlier than thirty days from the date on which the notice under sub s (2) was delivered to the District Magistrate This reading is also borne out by the other expression not later than thirty five days which is used in the section In this

(1) A I R 1957 A P 229

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Court in *H H Raja Harinder Singh* v *S Karnail Singh* (1) the expression not later than 14 days as used in r 119 under the Representation of the People Act was held to mean the same thing as within a period of fourteen days In that expression the number of days it was held should not exceed the number fourteen In the sub section we are dealing with the number of days should not exceed thirty five days On a parity of reasoning not earlier than thirty days would include the 30th day but not the 29th day because 29th day must be regarded as earlier than thirty days If the provision were not earlier than thirty days and not later than thirty days' it is obvious that only the 30th day could be meant This proves that the fixing of the date of the meeting was therefore in accordance with law and we respectfully disapprove of the view taken in the Andhra Pradesh case

The third point arises under the following circumstances The District Magistrate had arranged with the District Judge for a stipendiary judicial officer to preside over the meeting to be convened on 25th November The District Judge had nominated one Mr R R AGARWAL, Additional Civil Judge Aligarh for this purpose Mr R R AGARWAL made an order on 22nd November, 1966 intimating that he was unable to preside over the meeting on 25th November and that the meeting would be adjourned to 5th December The District Magistrate sent out notices on the same day intimating the members of the change of date It is contended that this action of the Additional Civil Judge, Aligarh violated the provisions of the fifth sub section The reason advanced is that the judicial officer is not empowered to adjourn the meeting in advance but he can only do so if he is unable to preside at the meeting, that is to say on the day on which the meeting is to be held In support of this contention a ruling of the Allahabad High

(1) A I R 1957 S C 271

Court reported in *Krishna Chandra Gupta* v *Prayag Narain* (1) is cited where at page 229 a Divisional Bench said that the authority under sub s (5) to adjourn the meeting is exercisable only on the date on which the meeting is convened and if that occasion does not arise the adjournment is improper Here again we find it difficult to accept the view expressed in the Allahabad High Court Sub s (4) provides that if the presiding judicial officer does not attend the meeting the meeting stands automatically adjourned after half an hour to a date and time to be appointed later and notified to the members by that officer under sub s (5) It seems pointless therefore to think that if the judicial officer knows in advance that he would not be able to attend the meeting that he has not the power to adjourn the meeting in advance No visible profit results from such a construction In fact the words of sub s (5) are that if the judicial officer is unable to preside at the meeting he may after recording his reasons adjourn the meeting to such other date and time as he may appoint This can happen not only at the meeting but also before the date of meeting if the judicial officer is in a position to say that he would be unable to preside at the meeting If this were not so some unforeseen event which requires the presiding officer to be absent would frustrate the entire non confidence motion because the judicial officer would be unable to adjourn it in advance That the consequences under sub s (4) would automatically flow also show that it should be possible for the presiding officer to adjourn a meeting which under the law would in any event be adjourned under sub s (4) In our opinion it is not necessary that the judicial officer should be present at the meeting and then adjourn it for purposes of sub s (5) He can take action in advance This will be convenient all round because it will save members from attendance on that day This was done in this case

(1) 1961 All L J 226

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and in our opinion the action was correct We do not read the word adjourn as being in any way different from the word postpone which is some times used The word adjourn means that the officer can postpone the meeting to a subsequent date

The High Court did not exercise its powers under Art 226 of the Constitution and we must not be intended to have meant that where the High Court has refused to exercise its discretion this Court would always interfere This case was admitted in this Court merely to clear a dispute about the law which seems to have evoked different interpretations in the High Courts

On a consideration of the whole matter we are of opinion that the petition was devoid of merit and although it was dismissed because the High Court did not choose to exercise its discretionary powers the result would have been the same if the High Court had gone into the matter elaborately and correctly The appeal must therefore be dismissed We order accordingly

The appeal shall stand dismissed with costs One hearing fee

Appeal dismissed

APPELLATE CIVIL

*Before Mr Justice Lakshmi Prasad**

SITAL DIN AND OTHERS PLAINTIFF APPELLANTS, 1967

May 16

v.

DEOKI NANDAN AND OTHERS DEFENDANT RESPONDENTS

Res Judicata—*Finding given against a party in a litigation which terminated in his favour—Whether that finding operates as* res judicata *in a subsequent litigation—Finding in earlier suit not necessary for the disposal of that suit—Earlier finding does not constitute* res judicata *in a subsequent suit*

U P Tenancy Act, 1939 *ss* 29 *and* 30—*Usar land given by Zamindar to appellant though unregistered deed dated 17th December* 1929—*Appellant found in possession since 17th December* 1929—S 30 *does not apply*—*Appellant acquired hereditary rights under* s 29

A finding given against a party in a litigation which terminates in favour of that party cannot operate as *res judicata* in a subsequent litigation in which arises a similar controversy

Where the earlier suit under s 180 of the U P Tenancy Act was dismissed on the ground that the case put forth by the plaintiff respondent that the defendants appellants had taken possession as trespassers was incorrect and in fact the appellants were in possession in accordance with the deed Ex A 3 If the Court even after coming to the above mentioned conclusion proceeded to decide as to what would be the right of the appellants under the deed Ex A 3 then certainly such a finding would not operate as *res judicata* in a subsequent proceeding under s 202 of Z A and L R Act between the same parties for the simple reason that it was hardly necessary for that finding being recorded in the earlier suit

Held whether or not the defendants appellants have acquired hereditary rights by virtue of their possession in accordance with the deed Ex A 3 is open for decision in this litigation under s 202 of Z A and L R Act notwithstanding the finding recorded against them in the earlier suit under s 180 of the U P Tenancy Act

Where the Zamindar gave Usar land by unregistered deed Ex A 3 dated 17th December 1929 to the appellants with

*While sitting at Lucknow

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liberty to use it as pasture land or to plant trees on it or bring it under cultivation on condition that in case they brought it under cultivation they would be liable to pay rent according to the quality of the land the appellants being found in possession of the land ever since December 1929

Held s 29 of the U P Tenancy Act applied to confer hereditary rights on the appellants the moment it is found that s 30 had no application

Second Civil Appeal against the judgment and decree dated 18th September 1959 passed by S D N SINGH, Additional Civil Judge Pratapgarh in Rent Appeal no 48 of 1958

The facts appear in the judgment

Mohd Husain, for the Appellant

B K Dhaon, for the Respondents

L PRASAD, J —This is a defendants Second Appeal One of the Defendants Appellants died during the pendency of the appeal and has been substituted by his heirs Likewise the Plaintiff Respondent died during the pendency of the appeal and has been substituted by his heir Swami Nath

The dispute in this case relates to a portion of plot no 34 2 bighas 4 biswas and 10 dhurs in area Relying on a registered patta dated the 10th of October 1948 executed in his favour by the then zamindar the plaintiff respondent filed a suit in respect of the disputed piece of land against the defendants appellants in the year 1950 purporting to be one under s 180 of the U P Tenancy Act on the allegation that the plaintiff respondent was a tenant of the disputed land whereas the defendants appellants had trespassed on it only a few days before the suit In defence the defendants appellants pleaded that they were in possession with the permission of the zamindar ever since December 1929 in accordance with a deed of licence executed in their favour on the 17th of December, 1929 The trial Court in that suit held that the

Ijazatnama dated the 17th of December 1929 resulted in creating hereditary rights in favour of the defendants appellants and accordingly dismissed the suit The plaintiff respondent went in appeal which was dismissed by an Additional Commissioner He then preferred a second appeal before the Board of Revenue The Board of Revenue held that even though the document relied on by the defendants appellants did not make them hereditary tenants still the allegation of the plaintiff respondent on the basis of which he founded his claim under s 180 of the U P Tenancy Act was incorrect and as such his suit must fail notwithstanding the fact that the status of the defendants appellants with reference to the disputed land was only that of a non occupancy tenant as provided in s 30 of the U P Tenancy Act Thus the Board of Revenue dismissed the appeal It is thereafter that the suit giving rise to this appeal was instituted seeking the ejectment of the defendants appellants under the provisions of s 202 of the U P Zamindari Abolition and Land Reforms Act The appellants pleaded that they were not non occupancy tenants but were hereditary tenants under the provisions of the U P Tenancy Act and became *sirdars* under the provisions of the U P Zamindari Abolition and Land Reforms Act

The trial Court upheld the plea raised in defence and dismissed the suit The plaintiff respondent went in appeal The lower appellate Court held that under the Ijazatnama dated the 17th of December 1929, the appellants could not claim any right higher than that of a non occupancy tenant as provided in s 30 of the U P Tenancy Act and as such they became Asamis under the provisions of the U P Zamindari Abolition and Land Reforms Act and were liable to ejectment In the result the lower appellate Court decreed the suit It is in these circumstances that the defendants have come up in second appeal

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I have heard learned counsel for the parties

The main contention of the learned counsel appearing for the appellants is that the view of the lower appellate Court that the appellants could be only non occupancy tenants by virtue of their possession under the deed dated the 17th of December 1929 is erroneous The material portion of the deed Ex A 3 has been reproduced in the judgment of the lower appellate Court It appears therefrom that the disputed piece of land which was then lying as Usar was given to the appellants with liberty to use it as pasture land or to plant trees on it or to bring it under cultivation on condition that in case they brought it under cultivation they would be liable to pay rent according to the quality of the land Since the deed Ex A 3 gives liberty to the appellant to use the disputed piece of land for the purpose of pasturage the lower appellate Court has held that s 30 of the U P Tenancy Act applied so as to prevent hereditary rights accruing in favour of the appellants under s 29 of the U P Tenancy Act It is this view of the lower appellate Court which is challenged by the learned counsel and his contention is that there could arise no occasion for s 30 of the U P Tenancy Act to apply unless the land let was pasture land In other words he argues that where Usar land is let with liberty to the lessee to bring it under cultivation or to use it as pasture land there arises no occasion for the application of s 30 to such land In my view the contention is right S 29 is general It clearly provides for the accrual of hereditary rights in favour of a tenant in possession unless he is a tenant of one of the kinds enumerated in cl (*a*) of s 29 S 30 is in the nature of an exception to the general provision in s 29 and provides that no hereditary rights would accrue in pasture land That being so it is obvious that s 30 would apply where pasture land is let In this case the Ijazatnama Ex A 3 itself shows that the

disputed land at the time it was given to the appellants was Usar and they were given option to use it for any of the purposes mentioned therein including the purpose of pasturage That being so I agree with the contention of the appellants counsel that s 30 is not attracted to the case and the view of the lower appellate Court to the contrary is erroneous

Learned counsel for the plaintiff respondent contended that the appellants were not entitled to claim any right in the disputed land on the basis of the deed Ex A 3 which was an unregistered document I am unable to appreciate the contention Even if it be assumed for a moment that the deed Ex A 3 would not be effective as a lease for one reason or the other the fact still remains that it has been found between the parties in the previous litigation referred to above that the appellants were in possession of the disputed land in accordance with the deed Ex A 3 That being so it is now settled between the parties as to when and on what terms the possession of the appellants over the disputed land started The very fact that the plaintiff respondent had to bring a suit for ejectment is enough to show that the appellants are and have been in possession of the disputed land Once it is found that the appellants have been in possession ever since December 1929, and that has got to be held because of such a finding recorded between the parties in the earlier suit it follows that the appellants acquired tenancy rights under the provisions of the U P Tenancy Act Likewise it must be held that s 29 applied to confer hereditary rights on the appellants the moment it is found that s 30 had no application I therefore, see no force in the contention that because of the deed Ex A 3 being unregistered the appellants are not entitled to get any rights and repel the same

Learned counsel for the plaintiff respondent when confronted with the position indicated above took up the

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I Prasad J

stand that the finding in the earlier litigation that the appellants were actually non occupancy tenants would also operate as *res judicata* in this litigation In support of his contention he places reliance on three cases viz

(1) *Veerasami Mudali* v *Palaniyappan* (1)

(2) *Nimmagadda Venkateswarlu* v *Bodapati Lin gayya* (2),

(3) *Murad Biswas* v *Basti Mandal* (3)

In my view none of these cases assists the plaintiff respondent The correct legal position is that a finding given against a party in a litigation which terminates in favour of that party cannot operate as *res judicata* in a subsequent litigation in which arises a similar controversy None of the three cases cited by the learned counsel appears to decide to the contrary

The headnote in the XLVI Madras Law Journal case is somewhat misleading The correct position can be ascertained on a reference to what is said in the course of the judgment on page 527 of the report The material observations run as below

> The question remains as to whether the matter is *res judicata* by reason of the decree in O S no 994 of 1907 whereby it was declared that plaintiff as *inamdar* was entitled to the plaint land together with costs of the suit, but the plaintiff s suit was dismissed inasmuch as the notice to quit given by him was irregular '

It is thus obvious that the finding given against the defendants in the earlier suit with regard to the question of title agitated by the plaintiff in that Madras case was bound to operate as *res judicata* in a subsequent suit not withstanding the fact that the earlier suit for possession was dismissed for the reason that a valid notice to quit

(1) XLVI Mad Law Journal 516 (2) (1924) I L R XLVII Mad 638
(3) A I R 1929 Cal 449

had not been given in so far as a decree for declaration as asked for by the plaintiff had been given It was thus not a case which terminated in favour of the defendant in its entirety

Exactly similar criticism applied to the second Madras case referred to above apart from the fact that the point in controversy before me did not arise directly in that case As appears from the headnote in that second Madras case the point in issue in the case was if a defendant where the suit had been dismissed could maintain a second appeal It is in that connection that the learned Judge who decided the case said that where the point decided adversely to the defendant is directly and substantially in issue and where in other proceedings the matter would be *res judicata* it would be contrary to all principles of justice and equity to hold that the defendant is precluded from agitating the matter on appeal merely because the suit was dismissed on some other ground From the facts it appears that the plaintiff had brought the suit on the basis of a lease granted to him by the first defendant and sought a declaration that the sale of the property leased to him by the official receiver in the insolvency of the first defendant s father was inoperative because on partition between the two much earlier than the insolvency the property had fallen to the share of the first defendant On these facts it is obvious that the interests of the plaintiff and the first defendant were identical and as such the first defendant would have as much a right of second appeal from the dismissal of the suit as the plaintiff himself I accordingly fail to see as to how it lays down the proposition contended for by the learned counsel for the plaintiff respondent The headnote in the Calcutta case cited by the learned counsel is also misleading The following observations from the body of the judgment on page 449 will make the position clear

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L. Prasad J.

The facts therefore are not that the suit was dismissed on a preliminary point making it unnecessary for the Court to go into the other questions that arose in the suit but that the questions were decided and made the foundation of a decree declaring the plaintiff's title and one of the prayers in the suit namely that for khas possession was refused on the ground that notice had not been served on the defendant

It is thus obvious that even this is not a case in which the suit had terminated in favour of the defendant in its entirety in so far as the plaintiff had been given a declaration in regard to the question of title and hence the finding on the issue pertaining to title would necessarily operate as *res judicata* in a subsequent litigation between the same parties Here we are concerned with a case where the suit under s 180 of the U P Tenancy Act was dismissed on the ground that the case put forth by the plaintiff respondent that the appellants had taken possession as trespassers was incorrect and in fact the appellants were in possession in accordance with the deed Ex A 8 If the Court in the earlier litigation even after coming to the above mentioned conclusion proceeded to decide as to what would be the rights of the appellants under the deed Ex A 8 then certainly such a finding would not operate as *res judicata* in a subsequent proceeding between the same parties for the simple reason that it was hardly necessary for that finding being recorded in the earlier suit

In the case of *Abhey Ram* v *Jhanda* (1) it was held

> Any issue decided by a court in favour of the plaintiff whose suit is ultimately dismissed on another ground cannot operate as *res judicata* as against the defendant in a subsequent suit A finding cannot be conclusive against a party if the de

(1) 1930 All Law Journal 1100

cree was not passed upon it but was made in spite of it '

The case was followed by a Division Bench of this Court in a subsequent case of *Parathnath* v *Rameshwar Pratap Sahi* (1) If I may say so with respect that is the correct legal position and the decisions given in these cases fully apply to the present case The following observations made in the case of *Midhnapur Zamindari Co Ltd* v *Naresh Narayan Roy* (2) also indicate that the contention raised by the learned counsel for the plaintiff respondent cannot be upheld

> Their Lordships do not consider that this will be found an actual plea of *res judicata*, for the defendants having succeeded on the other pleas had no occasion to go further as to the finding against them

I accordingly conclude that the question as to whether or not the defendants appellants have acquired hereditary rights by virtue of their possession in accordance with the deed Ex A 3 is open for decision in this litigation notwithstanding the finding recorded against them in the earlier suit under s 180 of the U P Tenancy Act

No other point has been urged before me

For the reasons given above I allow the appeal and dismiss the suit of the plaintiff respondent with costs throughout

Appeal allowed

(1) A I R 1983 All 491 (2) A I R 1922 P C 241 at p 243

APPELLATE CIVIL (F B)

Before Mr Justice Oak, Mr Justice Dwivedi and Mr Justice Gangeshwar Prasad

1967

May 19

CHOBEY SUNDER LAL PLAINTIFF-APPELLANT,

v

SONU *alias* SONPAL AND ANOTHER DEFENDANTS RESPONDENTS

U P Zamindari Abolition and Land Reforms Act, 1950 (*Act I of 1951*) *s 20(b)—Entry as sub tenant—Wether amounts to that of recorded occupant and confers Adhivasi rights—Entry of sub tenancy over a portion of land—Whether Adhivasi right limited to that portion—Proof of sub tenancy over whole plot—Whether permissible*

U P Consolidation of Holdings Act 1953 (*Act V of 1954*) *s 23—Constitution of India* (1950)—*Confirmation of statement of proposals—Whether precludes exercise of Writ jurisdiction*

A person whose name is recorded in the column of sub-tenants in the *khasra* or *Khataunt* of 1356 F without there being any one else recorded as *qabiz* or *dawedar qabiz* in the remarks column would be a recorded occupant and entitled as such to Adhivasi rights under s 20(*b*) of the Zamindari Abolition and Land Reforms Act

The decision of the Full Bench in the case of *Ram Dular Singh* v *Babu Sukhu Ram* (1) is not good law in view of the Supreme Court decisions in the cases of *The Upper Ganges Sugar Mills Ltd* v *Khalil ul Rahman* (2) and *Amba Prasad* v *Mahboob Ali Shah* (3)

Where a person is recorded as sub-tenant of a portion of the plot he would become Adhivasi of only that portion of the plot and it is not open to him for the purposes of s 20(*b*) of the Act to prove that he was sub-tenant of the whole plot

The confirmation of the statement of proposals under s 23 of the Consolidation of Holdings Act does not deprive of the High Court of its powers under Art 226 of the Constitution the actual exercise of that power however remaining a different matter dependent on the fact and circumstances of each case

(1) 1963 A L J 567 (2) 1961 A L J 97
(3) 1964 A L J 27

Second Appeal no 1579 of 1955 connected with Second Appeal no 1443 of 1961 and Civil Miscellaneous Writ no 446 of 1960 against the judgment and decree of Raj Kumar Gupta, Civil Judge Mainpuri dated 25th May 1955 in Civil Appeal no 4 of 1954

Behariji Dass, for the Appellant

S S Chandwarta, for the Respondents

DWIVEDI, J —These two appeals and the writ petition have been referred to a larger Bench for decision

During the hearing the parties counsel agreed that this Bench should decide three main questions of law arising in these cases and send back the reference to the learned Judges referring the cases for decision of the cases Accordingly we propose to express our opinion on the three main questions arising in these cases One of these questions is common to all these cases, the second question arises only in Second Appeal No 1443 of 1961, while the third question arises only in the writ petition These questions are

1 Whether, in view of the law declared by the Supreme Court in the cases of *The Upper Ganges Sugar Mills Ltd* v *Khalil ul Rahman* (1) and *Amba Prasad* v *Mahboob Ali Shah* (2), the decision of the Full Bench in the case of *Ram Dular Singh* v *Babu Sukhu Ram* (3) is not good law ?

2 Whether an entry of sub tenancy over a part of the holding in the *khasra* of 1356 F could confer the *adhivasi* rights under s 20(*b*) of the U P Zamindari Abolition and Land Reforms Act and further whether it is open to the plaintiff to show that such entry was erroneous or not binding and he was actually the sub tenant of the whole of the holding?

(1) 1961 A L J 27 (2) 1964 A L J 805
(3) 1963 A L J 667

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CHUBBY JEWZER LAL v. BOND ATTAS SONPAL

Dwivedi J

3 Can this Court interfere in a petition under Art 226 of the Constitution with the orders of the Consolidation authorities after the confirmation of the statement of proposals under s 23 of the Consolidation of Holdings Act by the Settlement Officer (Consolidation)?

The referring order in the writ petition does not formulate any specific question for decision and refers the whole case to the larger Bench But as already stated it is agreed at the Bar that this Bench may formulate questions and answer them only Accordingly we have formulated the three questions in the light of the referring order

It is not necessary to state the facts of the cases referred to us for deciding the first question It is a pure question of law and will have to be determined on a careful juxtapositional scrutiny of the Full Bench decision of this Court and two decisions of the Supreme Court S 20(*b*) of the Zamindari Abolition and Land Reforms Act provides that a person recorded as an occupant of a certain land in the *khasra* or *khataunt* of 1356 F shall become *adhwast* The majority decision in the Full Bench case was that a person recorded in the column of sub tenant in the *khasra* or *Khataunt* of 1356 F was not an occupant within the meaning of s 20(*b*)

The judgment of the majority was delivered by Sri Chief Justice DESAI, and SRI Justice PATHAK agreed with him Accordingly I shall refer to the judgment of the Chief Justice The reasoning of the Chief Justice is this

> (1) Having regard to the provisions of the Land Records Manual in force in 1356 F the phrase recorded as occupant occurring in s 20(*b*) of the Act must mean recorded as Qabiz or *dawedar qabiz* as provided in these provisions

(2) The entries made in columns 5 and 6 were not entries of the occupation at all and only the entries in the remarks column made with the words Dawedar Qabiz or Qabiz were entries of occupation and they are the entries referred to in s 20 (*b*)

It is now to be seen whether these two reasoning remain intact after the decisions of the Supreme Court in *The Upper Ganges Sugar Mills Ltd* v *Khalil ul Rahman* (1) and *Amba Prasad* v *Mahboob Ali Shah* (2) There is no reference to the first case in the Full Bench judgments In the first case *The Upper Ganges Sugar Mills Ltd* was the *thekedar* of the proprietary rights of the respondent zamindar During the term of the *theka* the Company brought certain lands under its cultivation The *theka* expired in June 1948 The Company, however continued in possession Consequently the respondent instituted a suit for its ejectment It was resisted by the Company on various grounds but was eventually decreed This matter was taken over in appeal to the Supreme Court The argument in the appeal was that the Company has become an *adhivasi* of the land under s 20(*b*) of the Act The phrase recorded as occupant in s 20(*b*) fell for construction by the Supreme Court The Supreme Court observed

> The word occupant used in this part of the Act is not a term of art and has not been defined anywhere in the Act or in the U P Tenancy Act or in the Land Revenue Act It must therefore be given its ordinary dictionary meaning which is a person in occupation'

It may be mentioned here that the Company was recorded as the *thekedar* in the *khasra* and *khatauni of* 1356 F According to the reasoning of the Chief Justice in the

(1) 1961 A L J 427 (2) 1964 A L J 805

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CHOBEY SUNDER LAL v. SONU ALIAS SONFAL

Dwivedi J

Full Bench case the Company could not be held to be an *adhivasi* in view of this entry Nevertheless the majority of the Supreme Court has held that the Company was an *adhivasi* within the meaning of s 20(*b*) Sri Justice WANCHOO said

> On the landlords own showing in this case the Company was not in possession as a *thekedar* as the *theka* had expired before 1356 F Under the circumstances we are of opinion that Company was recorded as an occupant in 1356 F
>
> Therefore the Company would be entitled to *Adhivasi* rights

The meaning given to the phrase recorded as occupant by the Supreme Court and the holding of the Supreme Court that the Company although recorded as a *thekedar* in the revenue records of 1356 F has become an *adhivasi* under s 20(*b*) cut across the two reasonings in the judgment of the Chief Justice in the Full Bench case I cannot see how it is possible to reconcile these reasonings with the view of the majority of the Supreme Court

The phrase recorded as occupant in s 20(*b*) again fell for construction by the Supreme Court in the second case Sri Justice HIDAYATULLAH observed

> Before we proceed to decide whether the answering respondents satisfy the above tests we must consider what is meant by the terms occupant and recorded The word occupant is not defined in the Act Since *khasra* records possession and enjoyment the word occupant must mean a person holding the land in possession or actual enjoyment The *khasra*, however, may mention the proprietor the tenant, the sub tenant and other person in actual possession as the case may be If by occupant' is meant the person in actual possession it is clear

that between a proprietor and a tenant the tenant and between a tenant and the sub tenant the latter and between him and the person recorded in the remarks column as dawedar qabiz the *dawedar qabiz* are the occupants This is the only logical way to interpret the section which does away with all intermediaries

It was further held that s 20(*b*) eliminates enquiries in to disputed possession by accepting the record in the *khasra* or *khataunı* of 1356 F It is clear from these ob servations that the phrase recorded as occupant is not confined to a person whose name is entered as *qabiz* or 'dawedar qabiz in the remarks column of the *khasra* of 1356 F According to these observations a person whose name is recorded in the column of sub tenant is also an occupant within the meaning of s 20(*b*) These observations also cut across the reasonings of the learn ed Chief Justice in the Full Bench case

It has been argued at the Bar that although the se cond decision of the Supreme Court expressly refers to the Full Bench case, it does not expressly over rule it Accordingly it cannot be said that this decision implied ly over rules the Full Bench decision It has also been pointed out that the observations of Sri Justice HIDAYAT ULLAH, which I have quoted earlier, are *obiter* inasmuch as in that case the occupants were, in fact, recorded as qabiz in the revenue records of 1356 F It is no doubt true that the occupants in that case were recorded as qabiz in the records of 1356 F But we do not agree that the observations which we have quoted earlier are *obiter* In order to decide whether a person entered as qabiz in the records of 1356 F was an occupant it was necessary that the true meaning of the phrase re corded as occupant should be determined The obser vations which we have quoted earlier are accordingly

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not *obiter dicta* It has been said that even an *obiter dictum* of the Supreme Court is binding on us

Sri Justice HIDAYATULLAH has referred to the Full Bench decision in his judgment for showing that this Court and the Board of Revenue have consistently been taking the view of a mere entry of a person s name as an occupant in the *khasra* or *khatauni* of 1356 F is sufficient for holding that he has become an *adhivasi* and that the Courts will not go behind that entry to find out whether the person was really in possession in 1356 F The Full Bench decision was not referred to for the purpose of interpreting the meaning of the phrase recorded as occupant I have already shown that it is not possible to reconcile the reasonings of the learned Chief Justice in the Full Bench decision with the two judgments of the Supreme Court Accordingly I am of opinion that it should be held that the two Supreme Court decisions impliedly over rule the Full Bench decision

Various arguments have been addressed to us to show that the Full Bench decision is correct Counsels have also relied on certain provisions of the Land Records Manual and on certain decisions It is not necessary to refer to those arguments and to those provisions and the decided cases for I have already held that the two decisions of the Supreme Court have over ruled the Full Bench decision The matter is no more *res integra* and the decisions of the Supreme Court are binding on us

I shall now take up the second question referred to us The second question may be split up into two parts

(1) Whether an entry of sub tenancy over a part of the holding in the *khasra* of 1356 F could confer the *adhivasi* rights under s 20(*b*)?

(2) Whether it is open to the plaintiff to show that such an entry was erroneous or not binding and

he was actually the sub-tenant of the whole of the holding?

The answer to the first part of the question will depend on the language of s 20(*b*) of the Zamindari Abolition and Land Reforms Act S 20(*b*) in so far as it is material reads

> Every person who was recorded as an occupant
>
> (i) of any land other than grove land or land to which s 16 applies or land referred to in the proviso to sub s (3) of s 27 of the U P Tenancy (Amendment) Act in the *khasra* or *khatauni* of 1356 Fasli , or
>
> (ii) of any land to which s 16 applies, in the *khasra* or *khatauni* of 1356 fasli shall be called *adhivasi of the land* '

It will appear that a person who is recorded as an occupant of any land becomes an *adhivasi* of that land and no more Accordingly if a person is recorded as an occupant of a part of a plot he will become an *adhivasi* of only that part of the plot and no more

It has already been held by the Board of Revenue by this Court and by the Supreme Court that for deciding whether a person has become an *adhivasi* we should look only to the entry in the *khasra* or *khatauni* of 1356 F and that we cannot go behind that entry to find out whether the person so entered was in actual possession in 1356 F If a person, who is entered as a sub tenant of a part of the holding wants to show that he is actually the sub tenant of the whole of the holding for getting the rights of an *adhivasi* under s 20(*b*), he cannot be permitted to do so It will be open to him to show that he is the sub tenant of the entire holding for purposes other than the purpose of becoming an *adhivasi* under s 20(*b*)

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I am unable to understand how s 240 B(c) is opposed to my view that a person recorded as occupant of a part of a plot will become the *adhivasi* of only that part and no more S 233, on the other hand, seems to contemplate a case where a person becomes an *adhivasi* of a part of the plot In such a case the rent payable by the *adhivasi* shall be determined in a particular manner in accordance with the rent computed at hereditary rates applicable to the land

I shall now take up the third question S 52 of the Consolidation of Holdings Act, in so far as it is relevant provides as follows

> (1) As soon as may be after fresh maps and records have been prepared under s 27, the State Government shall issue a notification in the official *Gazette* that the consolidation operations have been closed in the unit and the village or villages forming part of the unit shall then cease to be under consolidation operations
>
> (2) Notwithstanding anything contained in sub s (1), any order passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases or proceedings pending under this Act on the date of issue of the notification under sub s (1) shall be given effect to by such authorities as may be prescribed and the consolidation operations shall for that purpose, be deemed to have not been closed

It may be mentioned here that the Consolidation of Holdings Act has been amended several times S 52 was amended in 1963 I have quoted s 52 as it stands after its amendment in 1963 The writ petition arises out of a consolidation proceeding which was initiated in accordance with the provisions of the Consolidation of Holdings Act as it stood before its amendment in 1958

Sub s (1) of s 52 has however not undergone any material change Sub s (2) of s 52 was brought into existence by the amendment in 1963

A notification under sub s (1) of s 52 is published after the records have been prepared under section 27 Records under section 27 are prepared after possession of the allotted land has been delivered to the allottees Possession is delivered to the allottees after the statement of proposals has been confirmed The statement of proposals is confirmed by the Settlement Officer under s 23 The confirmed statement becomes final In this case the writ petition was filed after the confirmation of the statement of proposals Hence it is argued that this Court has got no power to entertain the writ petition It is said that the finality attached to the statement of proposals after its confirmation by the Settlement Officer precludes this Court from interfering with any order of the consolidation authorities thereafter

S 23 as it stood before 1958 read

> Where no objections are filed on the statement of proposals within the time specified in s 20 or where such objections are filed and have been disposed of under s 21 or 22 the Settlement Officer (Consolidation) shall after such modification or alteration as may be necessary in view of the order passed under s 21 or 22 confirm the statement and thereupon the statement so confirmed shall become final and be published in the village

S 23 was amended in 1958 On amendment it consisted of three sub sections It is not necessary to reproduce sub ss (1) and (3) Sub s (2) is, however material and reads as follows

> The Statement of Proposals so confirmed shall be published in the unit and shall except as otherwise provided by or under this Act be final

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S 23 was again amended in 1963 Sub s (2) however remained unmodified in substance S 48 deals with the power of revision of orders Before 1958 it read as follows

> The Director of Consolidation may call for the record of any case if the Officer by whom the case was decided appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise jurisdiction so vested or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit

S 48 was amended in 1958 On amendment it read as follows

> The Director of Consolidation may call for the record of any case decided or proceedings taken where he is of the opinion that a Deputy Director Consolidation, has—
>
> (i) exercised jurisdiction not vested in him in law or
>
> (ii) failed to exercise the jurisdiction vested in him, or
>
> (iii) acted in the exercise of his jurisdiction illegally or with substantial irregularity
>
> and as a result of which substantial injustice appears to have been caused to a tenure holder, and he may, after affording reasonable opportunity of hearing to the parties concerned pass such orders in the case or proceeding as he thinks fit

s 48 was again amended in 1963 Now it consists of three sub sections Sub s (1) is material for our purpose It is as follows

> The Director of Consolidation may call for and examine the records of any case decided or proceed

ings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings, or as to the correctness legality or propriety of any order passed by such authority in the case or proceeding and may after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit

The Settlement Officer (Consolidation) is an authority subordinate to the Director of Consolidation Upto 1958 an order made by the Settlement Officer (Consolidation) was revisable by the Director of Consolidation under s 48 Accordingly when s 23 declared that the statement of proposals confirmed by the Settlement Officer shall become final it made the confirmed statement of proposals immune from an attack in revision under s 48 The word final in s 23 would preclude a revision under s 48 Of course no appeal lay against the order of the Settlement Officer In 1958 the power of revision was confined to the order made by a Deputy Director of Consolidation No revision could be filed against the order of a Settlement Officer (Consolidation) Accordingly the statement of proposals confirmed by the Settlement Officer could not be revised under s 48 Consequently the confirmed statement of proposals became final for the purposes of the Consolidation of Holdings Act On the amendment of s 48 in 1963 the Director of Consolidation could revise an order of any subordinate authority So after 1963 the statement of proposals, even though confirmed by the Settlement Officer, became revisable under s 48 Now sub s (2) of s 23 itself states that the statement of proposals confirmed by the Settlement Officer shall become final except as otherwise provided by or under the Consolidation of Holdings Act S 48 provides for a revision of his order by the Director of Consolidation

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It cannot be held that the word final in sub s (2) deprives this Court of the power under Art 226 of the Constitution The power of this Court under Art 226 is a power derived from the paramount law of the land S 23(2) is a law made under this paramount law It can not take away this Court s power under the paramount law *Asiatic Engineering Co* v *Achhruram* (1) This view is further strengthened by Art 227 of the Consti tution Art 227 provides that all Courts and tribunals situate within the territorial jurisdiction of High Court are subject to the superintendence of the High Court The consolidation authorities, who act as tribunals under the Consolidation of Holdings Act are subject to the superintendence of this Court, and this Court can issue an appropriate writ order or direction to them in an appropriate case I am of opinion that even if the statement of proposals has been confirmed this Court is, speaking generally, not deprived of the power to inter fere with the orders of consolidation authorities under Art 226 of the Constitution The power to interfere remains in tact Although this Court retains the power to interfere with the orders of the Consolidation autho rities in spite of s 23(2) it may decline to interfere on a consideration of the circumstances of a particular case Power under Art 226 is discretionary, and naturally dis cretion will be moulded by the facts and circumstances of each case

Sub s (2) of s 52 also suggests that this Court may issue appropriate writs orders or directions to the con solidation authorities even after the statement of pro- posals has been confirmed It provides that the orders of this Court made under Art 226 shall be implement ed by the authorities as may be prescribed But it has been argued that sub s (2) of s 52 which came into be ing in 1963, will not apply to the present case which

(1) A I R 1951 A I 746 at p 768

arises out of the provisions of the Consolidation of Holdings Act as it stood before its amendment in 1958 For this purpose our attention has been drawn to s 47 of the U P Consolidation of Holdings (Amendment) Act 1958 which introduced sub s (2) in s 52 S 47 in so far as it is material, reads

(1) In units notified under s 4 of the principal Act prior to the date on which this Act comes in to force , all work in regard to or connected with consolidation operations—

(i) beyond the stage of publication of the statement of proposals under s 20 of the principal Act, where on or before the said date that statement had already been published and

(ii) upto and inclusive of the stage of confirmation of the Statement of Principles under s 18 of the principal Act where on or before the said date notices under s 9 of the principal Act as if this Act has not come into force

(2) All other work, to which the provisions of sub s (1) do not apply shall be conducted and concluded in accordance with the provisions of the principal Act as amended by this Act

(3) Notwithstanding anything contained in sub s (1) or (2) the provisions of clause (1) of s 49 of the Uttar Pradesh Consolidation of Holdings (Amendment) Act 1958 shall continue to apply to proceedings covered by that clause

Cl (1) of s 49 of the U P Consolidation of Holdings (Amendment) Act, 1958 reads as under

Notwithstanding the amendment of the principal Act by this Act all proceedings commenced prior to and pending on the date on which this Act when comes into force—

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(1) relating to correction or records under s 7 of the principal Act shall be completed in accordance with the provisions contained therein and shall be deemed to be proceedings taken under ss 7 and 8 of the principal Act as amended by this Act All future proceedings thereafter shall be conducted and concluded in accordance with the provisions of the principal Act as amended by this Act

The combined result of ss 47(1) and (3) and s 49(1) is that the proceedings started under the provisions of the Consolidation of Holdings Act as it stood before 1958 will be conducted in accordance with the provisions of that Act as it then stood Accordingly s 52(2) will not apply to those proceedings But this does not conclude the matter Sub s (2) of s 47 clearly provides that all other work to which the provisions of sub s (1) do not apply shall be conducted and concluded in accordance with the provisions of the Consolidation of Holdings Act as amended by the Consolidation of Holdings (Amendment) Act 1958 It seems to me that the expression All other work in sub s (2) would include the work of implementing the orders of this Court made under Arts 226 and 227 of the Constitution If that is so, as I think then sub s (2) of s 47 applies sub s (2) of s 52 to a proceeding governed by the Consolidation of Holdings Act as it stood before 1958

In *Atar Singh* v *Dhoop Singh* (1) the Settlement Officer (Consolidation) dismissed an appeal under s 21 of the Consolidation of Holdings Act on the ground that the notification under s 52 of the said Act had already been published in the Gazette His order was impeached in a writ petition The learned single Judge who heard the petition agreed with the view of the Settlement

(1) 1968 A L J 975

Officer (Consolidation) and dismissed the petition His judgment was upheld in appeal by a Division Bench There was no argument before the Division Bench or before the single Judge that this Court could not issue a writ, order or direction under Art 226 where statement of proposals has been confirmed by the Settlement Officer (Consolidation) There is no discussion on this point in either judgment

In *Smt Natho* v *Board of Revenue* (1) also there was no argument that this Court could not exercise its power under Art 226 where the statement of proposals has been confirmed by the Settlement Officer (Consolidation)

In *Smt Ramrati* v *The Regional Deputy Director of Consolidation* (2) a writ petition was filed against an order of the Deputy Director of Consolidation passed in an objection under s 12 of the Consolidation of Holdings Act A learned Single Judge while declining to interfere said,

> 'The writ petition arises out of an objection under s 12 of the Act Even if the writ petition were to be allowed and the objection under s 12 is remitted for further hearing all that the petitioners can hope is to get the objection under s 12 dismissed But such dismissal will have no effect on the statement under s 23 of the Act It is therefore futile to remit the objection under s 12 of the Act for further hearing In view of the developments in the case the writ petition may be dismissed"

It would appear from this passage that the learned Judge considered that it was not a fit case where the Court should exercise discretion for interfering with the order of the Deputy Director of Consolidation The learned

(1) 1966 A L J 568 (2) 1963 R D 185

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Judge did not dismiss the petition on the ground that after the confirmation of the statement of proposals this Court cannot act under Art 226 of the Constitution It may also be noticed that the petitioner did not ask for the relief that the statement of proposals itself may be quashed

In *Gayatri Devi Misra* v *District Deputy Director of Consolidation* (1) also there was no argument that the confirmation of the statement of proposals by the Settlement Officer (Consolidation) precludes the exercise of this Court s power under Art 226 The petition was dismissed on the merits

In *Bansidhar* v *Deputy Director of Consolidation* (2) a person filed an objection under s 9 of the Consolidation of Holdings Act as it stood after its amendment in 1958 before the Consolidation Officer The Consolidation Officer held on his objection that his name should be entered as a trespasser in the revenue records He filed an appeal It was dismissed Then he filed a revision which met the same fate Then he filed a writ petition against the orders of the consolidation authorities During the pendency of the writ petition the statement of proposals was confirmed Then the respondents in the petition raised a preliminary objection that the petition could not be heard The learned Judge, who heard the petition upheld the objection and dismissed the petition It was argued on behalf of the petitioner that this Court could issue an appropriate writ order or direction by virtue of sub s (2) of s 52 of the Consolidation of Holdings Act While not accepting this argument the learned Judge said

> It does not appeal to me that s 52(2) is of any assistance The orders of this Court in the writ petition will be given effect to But that does not

(1) 1966 R D 81 (2) 1967 R D 51

help in deciding the question whether the discretionary power of issuing a writ should be exercised in favour of the petitioner Further it appears to me that as allotment of *chaks* had taken place the petitioner would not get any relief even if the writ petition was decided in his favour

It would appear from this passage that the learned Judge dismissed the petition for he took the view that it would not be a proper exercise of discretion to interfere with the orders of the consolidation authorities in the circumstances of that case It was not held by the learned Judge that after the confirmation of the statement of proposals under s 23 this Court cannot exercise power under Art 226

Kishan Singh v *Deputy Director of Consolidation* (1) is a case of the different type In this case one of the arguments of counsel for the petitioner appellant before the Division Bench in appeal was that the statement of proposals having been confirmed under s 23 as it stood after its amendment in 1958, the Deputy Director of Consolidation could not interfere in revision with the order of the second appellate authority In support of his argument counsel relied on *Atar Singh's* case (2) The Division Bench distinguished that case for the reason that it proceeded on the provisions of s 23 as it stood before its amendment in 1958 I have already quoted the provisions of s 23(2) as it stood after amendment in 1958 Relying on the words except as otherwise provided by or under this Act in sub s (2) of s 23 the learned Judges held that the Deputy Director could interfere in revision even after the confirmation of the statement of proposals The learned Judges said

(1) 1965 R D 299 (2) 1963 A L J 975
(3) 1963 A L J 867

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Therefore, it was contemplated that the statement of proposals confirmed under s 23(1) would be final unless there was an order under some other provision of the Act detracting from that finality Now an order passed under s 48 of the Act would, in our opinion be an order which would govern the finality of the statement of proposals

None of these cases go to the length of holding that the hand of this Court is frozen on the confirmation of the statement of proposals It may be made clear that the correctness of none of these decisions was questioned before us and I should not be deemed to have expressed any opinion about it this way or that way

To sum up, my answers to the three questions are as follows

Q 1 In the light of the decisions of the Supreme Court in *Upper Ganges Sugar Mills Ltd* v *Khalil ul Rahman* (1) and *Amba Prasad* v *Mahboob Ali Shah* (2) the decision of the Full Bench in *Ram Dular Singh* v *Babu Sukhu Ram* (3) is not good law

Q 2(*a*) If the name of a person is entered in the column of sub tenant in respect of a portion of the plot in the *khasra* of 1356 F, he would become *adhivasi* of that portion only and no more under s 20(*b*)

(*b*) For the purpose of showing that he is an occupant within the meaning of s 20(*b*) of the U P Zamindari Abolition and Land Reforms Act it will not be open to the person mentioned in question no 2(*a*) to show that he was actually the sub tenant of the entire holding It will be open to him to show that he was the sub tenant of the entire holding for any other purpose

(1) 1961 A L J 97 (2) 1964 A L J 805
(3) 1968 A L J 867

Q 3 The confirmation of the statement of proposals under s 23 of the Consolidation of Holdings Act does not deprive the Court of its power under Art 226 of the Constitution The power remains intact but the exercise of the power being discretionary, the Court may mould its discretion according to the facts and circumstances of each case

The cases should now go back to the learned Judges who have referred them for decision on other points

GANGESHWAR PRASAD, J —I have had the benefit of reading the judgment of my learned brother Dwivedi and I concur with him on all the three questions formulated by him I, however wish to make some observations of my own

Question 1—In the Full Bench case of *Ram Dular Singh* v *Babu Sukhu Ram* (1) the appellants claimed that they became Adhivasi of the disputed land under the provisions of s 20 (*a*) (ii) of the U P Zamindari Abolition and Land Reforms Act and then became Sirdars under Chapter IX A of the Act Alternatively, they claimed that they became Adhivasis under s 20(*b*) of the U P Zamindari Abolition and Land Reforms Act and thereafter became Sirdars under Chap IX A of the Act Question 2 before that Full Bench related to the first claim of the appellants and question 3 to the second claim made by them in the alternative DESAI, C J, who delivered the majority judgment, proceeded to answer question 3 after answering question 2 in the affirmative and holding that the appellants became Adhivasis under s 20(*a*) (ii) of the U P Zamindari Abolition and Land Reforms Act and subsequently Sirdars under Chap IX A of the Act Obviously, if the appellants became Adhivasis under one provision of s 20 it was wholly unnecessary for them

(1) 1968 A L J 667

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to invoke the aid of any other provision of the section in support of their claim The learned Chief Justice however, examined the alternative claim also, and expressed his opinion on the question whether the appellants who were recorded as subtenants in the Khasra and Khataunı of 1356 Fasli could be said to have been recorded as occupants within the contemplation of s 20(*b*) of the U P Zamindari Abolition and Land Reforms Act

In arriving at his conclusion on the above question the learned Chief Justice adopted two methods of approach Firstly he determined the meaning of the word occupant in s 20(*b*) with reference to the Land Records Manual Secondly, he confirmed the result of the first and the primary approach by an examination of other provisions of the U P Zamindari Abolition and Land Reforms Act for ascertaining whether the benefit of s 20(*b*) was intended to be conferred upon persons who were recorded as tenants or subtenants in the relevant records

The first approach was based on the ground that in order to understand what is meant by recorded as occupant in s 20(*b*) one must necessarily refer to the provisions of the Land Records Manual in force in 1356 Fasli because entries in Khasras and Khataunis were to be made in accordance with its provisions In *The Upper Ganges Sugar Mills Ltd* v *Khalil ul Rahman* (1) the Supreme Court has, however held that the word occupants as used in s 20(*b*) of the U P Zamindari Abolition and Land Reforms Act is not a term of art and has not been defined anywhere in the Act or in the U P Tenancy Act or in the Land Revenue Act and that it must, therefore, be given its ordinary dictionary meaning which is a person in cultivation This

(1) 1961 A L J 97

pronouncement of the Supreme Court precludes the determination of the meaning of the word occupant with reference to the provisions of the Land Records Manual and lays down in clear terms what the word means In view of the above pronouncement and in view of the scope of the first question which this Bench is answering it is not necessary to discuss how far the provisions of the Land Records Manual support the interpretation put upon the word occupant in the majority judgment in *Ram Dular Singh's* case (1) But I may briefly draw attention to certain matters in that connection Firstly paras 82 83 84 and 85 of the Land Records Manual which have been referred to in the said judgment did not use the word occupant in relation to the persons with whom they dealt and described such persons in a different manner Secondly the entries of Dawedar Qabiz and Qabiz which according to the majority judgment were the entries contemplated by s 20(*b*) were two distinct kinds of entries required to be made in two different situations indeed paras 84(*c*) and (*d*) and 85 provided for three types of entries viz *Ghair Qabiz Dawedar Qabiz' 'Qabiz Dawedar'* and *'Qabiz'* for three different situations and it does not seem to be possible to say that the word occupant was used in s 20(*b*) to denote only persons in respect of whom any entry of any of these three types was made and to denote no others Thirdly if the persons in respect of whom any of the above types of entries were made in the relevant records were the only persons intended to be treated as being recorded as 'occupants for the purpose of s 20(*b*) the legislature could have easily made its intention known by using the abovementioned words or if that was inconvenient by referring to the relevant paragraphs of the Land Records Manual Fourthly column 6 of the Khasra was meant not only for subtenants and certain

(1) 1965 A L J 867

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kinds of tenants but also for occupiers of land without consent of the person entitled to admit as subtenant, and the three types of entries mentioned above which were to be made in certain situations only did not cover all kinds of trespassers

Now as to what I have described as the second approach adopted by DESAI, C J His Lordship observed that the rights of tenants and subtenants were dealt with by other provisions of the U P Zamindari Abolition and Land Reforms Act and s 20(*b*) must therefore be regarded as not meant to confer Adhivasi rights on tenants and subtenants and as excluding them from the category of persons recorded as occupants' even though they were recorded in the records spoken of in that provision and were also in occupation A somewhat similar method of approach appears to have been adopted in the argument on behalf of the landlords in *The Upper Ganges Sugar Mills Ltd* v *Khalil ul Rahman* (1) and not to have found favour with the Supreme Court In that case, if the Company concerned had in fact been a thekedar it would have been entitled to the benefit of s 12 of the U P Zamindari Abolition and Land Reforms Act but the benefit of that section was not available to the Company as the theka in its favour had expired and the Company was not a thekedar although it was recorded as such The question was whether the Company was entitled to the benefit of s 20(*b*) Dealing with the argument on behalf of the landlords WANCHOO, J (as his Lordship), then was who delivered the majority judgment of the Supreme Court observed

> What is contended on behalf of the landlords is that as the Company was recorded as a thekedar in 1366 F it is not open to the court to go behind

(1) 1961 A L J 97

that entry and therefore it must be held that the Company was in occupation as a thekedar in that year and thus was in occupation on behalf of the landlords and not on its own behalf In this connection we may point out that the Company claimed that it was entitled to possession not only as an Adhivasi under s 20 but also as a hereditary tenant under s 12 which provides that a thekedar under certain circumstances becomes a hereditary tenant To meet the Company s case under s 12 the landlords contended that the Company was not a thekedar in 1356F because the theka expired on June 30, 1948 The Landlords were thus taking contradictory positions for the purposes of ss 12 and 20, in opposition to the claim under s 12 they said that the Company was not their thekedar in 1356F while in opposition to the claim under s 20 they said that the Company was not in possession on its own behalf but as their thekedar '

The fact that s 12 deals with the rights of a thekedar was not regarded by his Lordships as a reason for holding that a person recorded as a thekedar is not covered by s 20(*b*) The conclusion that seems to follow from the above decision is that the fact that certain kinds of tenants and subtenants have been dealt with under s 20(*a*) does not lead to the result that s 20(*b* does not apply to persons recorded as tenants or subtenants Just as s 12 deal with persons who were in fact thekedars s 20(*a*) deals with persons who were in fact tenants or subtenants or would be deemed to have been tenants or subtenants irrespective of entries and possession S 20(*b*) on the other hand deals with those who were recorded as occupants in the Khasra and Khataunt of 1356 Fasli and there is nothing in it to show that it does not include also those persons who could have claimed Adhivasi rights under

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s 20(*a*) It will be noticed that sub cls (i) and (ii) of clause (*a*) of s 20 open with the words except as provided in sub cl (i) of cl (*b*) Cls (*a*) and (*b*) confer the same kind of right and if the persons dealt with by them belonged to mutually exclusive categori es the words except as provided in sub cl (i) of cl (*b*) were unnecessary I may here mention that s 20 as originally enacted contained no such words that they were introduced with retrospective effect as a combin ed result of U P Act XVII of 1953 and U P Act XX of 1954 These words give s 20(*b*) a priority over and an overriding effect on s 20(*a*) and the natural consequence is that s 20(*a*) cannot be read as limiting the scope of s 20 (*b*) and the latter provision cannot be so interpreted as to exclude from its ambit persons recorded as tenants or sub tenants In fact the pro cess of application of s 20 would, in my opinion be that it has first to be ascertained whether a person be came an Adhivasi under s 20(*b*) by virtue of being recorded as an occupant in the relevant records and it is only when he does not tisfy this simple require ment that the question will arise whether he became an Adhivasi under s 20(*a*) It is another matter that a person who acquired higher rights than those of an Adhivasi may dispense with the benefit of s 20(*b*) and that—if s 20(*b*) is not read as being prior to s 20(*a*) a person who became an Adhivasi under s 20(*a*) does not need the help of s 20(*b*) for the same purpose But if a person was not a tenant or sub tenant it can not be said that he loses the benefit of both ss 20(*a*) and 20(*b*) of the former by not having in reality been a tenant or a sub-tenant on the date immediately pre ceding the date of vesting and of the latter on account of the fact that although he was recorded as in occupa tion in the Khasra or Khatauni of 1356 Fasli he was recorded as a tenant or a sub tenant As I have said

above an argument on this line was advanced before the Supreme Court on behalf of the landlords in the case of the Upper Ganges Sugar Mills Ltd but was not accepted and in spite of the fact that the Company concerned was recorded as a thekedar it was held to have acquired Adhivasi rights under s 20(*b*) The position is not different in the case of a person record ed in the revenue records of 1356 Fasli as a tenant or a sub tenant and on the basis of the decision of the Supreme Court it must be held that he did acquire Adhivasi rights under s 20(*b*)

It was urged in the course of argument before this Bench that if the entry in 1356 Fasli relating to the Company had been regarded as amounting to the Company having been recorded as an occupant it would have been unnecessary for the Supreme Court to enquire into the question whether the Company was in fact a thekedar and it was suggested that if the Company had really been a thekedar the Supreme Court would not have held that it was recorded as an occupant The enquiry was however, necessary, because if the Company had in fact been a thekedar two consequences would have followed Firstly, the Company would have been deemed to have become a hereditary tenant under s 12 of the U P Zamindari Abolition and Land Reforms Act as claimed by it in the first instance Secondly, it would then have been in 1356 F an intermediary as defined in s 3 (12) of the Act and could not have therefore been regarded as an occupant' on account of explanation IV to s 20(*b*)

In the light of the decision of the Supreme Court in the case of Upper Ganges Sugar Mills Ltd that portion of the majority judgment in Ram Dular Singh's case which deals with question 3 of that case cannot be said to be good law The later decision of the Sup

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reme Court in *Amba Prasad* v *Mahboob Ali Shah* (1), however, deals in explicit terms with the position of persons recorded as tenants or sub tenants in the Khasra or Khataumi of 1356 Fasli for the purpose of s 20(*b*) and it has the effect of overruling *Ram Dular Singh's case* (2) in so far as it was held in that case that a person recorded as a tenant or a sub tenant was not recorded as an occupant for the above purpose

The submissions that were made with regard to Amba Prasad's case were two First, as, in that case, the persons concerned were recorded as Qabiz the observations of the Supreme Court were in the nature of *obiter* and are, therefore, not binding Second, an observation made in that case too indicates that persons recorded as tenants or sub-tenant cannot be treated as having been recorded as occupants Neither of these submissions, however, has any force

The persons concerned in the above case were entered as *Qabiz* and for deciding the question whether they could be treated as having been recorded as occupants the Supreme Court elaborately discussed the meaning of the expression occupant' in s 20(*b*) The observations made by the Supreme Court in that connection cannot therefore, be said to be in the nature of *obiter* Even if, however, they are in the nature of *obiter* they amount to a declaration of law under Art 141 of the Constitution and have a binding force

The second submission is based on the following observation of the Supreme Court

> The word occupant thus signifies occupancy and enjoyment Mediate possession (except where the immediate possessor holds on behalf of the mediate possessor), is of no consequence '

(1) 1964 A L J 806 (2) 1958 A L J 667

It has been contended on the basis of the above observation that a tenant held on behalf of a proprietor and a sub tenant on behalf of a tenant and neither of them could consequently be an occupant The contention appears to me to be misconceived The observation quoted above necessarily implies hat two persons may stand in relation to each other as nte possessor and immediate possessor in a variety of tions and that holding of a land by the immediate essor on be half of the mediate possessor is only o e of such situations For instances of various types of mediate and immediate possession and their distinguishing features reference may be made to Salmond on Jurisprudence (Twelfth Edition) page 282 Roscoepound s Jurisprudence Vol V page 110 and Paton s Text Book of Jurisprudence (1946 Edition) page 437 The types it would appear represent not a rigidly fixed demarcation but only a rough and a frequently overlapping classification To which type the relationship between the mediate and the immediate possessor in a particular case belongs has to be determined in the light of the distinctive features of that relationship Whether an immediate possessor holds on behalf the mediate possessor depends upon the nature and extent of their respective interests enjoyment control and power of exclusion etc in respect of the object of possession The possession of a person having a derivative interest is not necessarily on behalf of the person from whom the interest is derived A tenant and a sub tenant derived their interest from a proprietor and a tenant respectively but they remained in possession in their own right and for their own benefit Their rights arose both under contract and under statute So long as their interest subsisted they could exclude the person from whom they derived their interest They were not liable to ejectment except in accordance with

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the procedure prescribed by law and the person from whom they derived their interest could not put an end to their possession without recourse to prescribed legal proceedings It thus appears to be clear that even though the proprietor and the tenant remained respectively in mediate possession of what was held by a tenant and a sub tenant in immediate possession the latter did not hold on behalf of the former The observation of the Supreme Court quoted above does not therefore lend support to the proposition that tenants and sub-tenants in immediate possession were not occupant and the real occupants were the mediate possessors i e, the proprietor and the tenant respectively Such an interpretation is in fact that ruled out by the earlier observations that 'it is clear that between a proprietor and a tenant the tenant and between a tenant and the sub tenant the latter and between him and a person recorded in the remarks column as Dawedar Qabiz the Dawedar Qabiz are the occupants

The position therefore is that the decision in *Ram Dular Singh's case* (1) on the question whether a person recorded as a tenant or a sub tenant in Khasra or Khataunt of 1356 Fasli is to be treated as an occupant for the purpose of s 20(*b*) of the U P Zamindari Abolition and Land Reforms Act is not good law in view of the two Supreme Court decisions

Question 2—It is well settled now that s 20 (*b*) is not concerned with the interest or actual possession of the person spoken of in that provision and its sole concern is with the existence of a particular kind of record relating to him in the Khasra or Khataunt of a particular year The record alone and by itself constitutes the basis of acquisition of the right conferred by the said provision It naturally follows that the

(1) 1968 A L J 867

right depending upon the record extends as far as the record goes and that it extends no further A person who claims that he became an Adhivasi of the land although he was not recorded as an occupant in respect of it in the Khasra or Khataunt of 1356 Fasli may base his claim on s 20(*a*) but he cannot rely on s 20(*b*)

It will be seen that s 20(*b*) speaks of any land and not of any holding or any plot of land A holding was a unit created by an engagement and a plot of land was a unit created by revenue records But s 20(*b*) has no reference to and does not contemplate either of such units It seems, therefore obvious that a person recorded as an occupant over a part of a plot of land would be entitled to the benefit of s 20(*b*) in respect of that part, and would not be entitled to the benefit of the said provision in respect of any other part of that plot

Question 3—It is indisputable that the extent of finality provided by s 23 of the U P Consolidation of Holdings Act cannot exceed the powers of the legis lature which enacted the section The section cannot, therefore, either exclude or control the jurisdiction of the High Court under Art 226 of the Constitution It is another matter altogether that the High Court may in a particular situation decline after the consoli dation proceedings have gone beyond s 23 stage to exercise the extraordinary jurisdiction conferred upon it by Art 226, but that would be not because of any limitation placed upon the exercise of that jurisdic tion by s 23 but because of the inherent nature of that jurisdiction and the considerations which have to be taken into account in exercising it

Since unlike s 52 of the U P Consolidation of Holdings Act as it now stands s 23 does not lay down what effect an order of the High Court passed in a

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writ petition under Art 226 will have upon the consolidation operations it seems necessary to say a few words about s 52 For the reasons which have been exhaustively dealt with by my learned brother DWIVEDI, I too think that the said provision applies also to proceedings governed by the U P Consolidation of Holdings Act as it stood before 1958 But even if it were not, so, s 52 as it stood before the amendment could not have operated as a bar to the exercise of the jurisdiction vested in the High Court under Art 226 or to the implementation of the orders passed by it under that Article It is true that the Act in its old form did not provide for carrying such orders into effect but that could neither prevent the High Court from exercising its jurisdiction under Art 226 nor render the exercise of the jurisdiction ineffective and nugatory Even if s 52 had stood in its unamended form the result, in my opinion, would not have been different from what it is now under the amended form of the section It may be that it would then have been necessary for the High Court to pass some other directions or orders calling upon the appropriate authority to take suitable steps for implementing the orders but it appears to be undeniable that if the jurisdiction of the High Court could not be taken away or curtailed directly by any provision in the Act it could not be taken away or curtailed by reason of the fact that the consolidation operations had closed The implementation of the orders of the High Court would have required the reopening of certain matters which were regarded as settled, and what will be done now under s 52 (2) would have been done even then I may here refer to the decision of the Supreme Court in *Raj Krishna Bose* v *Binod Kanungo* (1) which furnishes a complete answer to the argument based on the diffi

(1) A I R 1954 S C 202

culty of reopening closed proceedings and also a solution of the difficulty The decision dealt with a case under the Representation of the People Act S 105 of the Act provides that every order of the Tribunal under that Act shall be final and conclusive Dealing with the effect of that provision on the powers of the Supreme Court under Art 136 and those of the High Courts under Art 226 the Supreme Court observed

> Our power to make such an order was not questioned but it was said that when the legislature states that the orders of a Tribunal under an Act like the one here shall be conclusive and final (s 105) then we should not interfere It is sufficient to say that the powers conferred on us by Art 136 of the Constitution and on the High Courts under Art 226 cannot be taken away or whittled down by the legislature So long as these powers remains, our discretion and that of the High Courts is unfettered

The Supreme Court did observe that Tribunals constituted under the Act were *ad hoc* bodies and remand could not easily be made as in ordinary course of law, but it passed an order to the following effect

> We set aside the order of the Tribunal and remit the case to the Election Commission with directions to it to reconstitute the Tribunal which tried this case and to direct the Tribunal to give its findings on all the issues raised and to make a fresh order '

In the light of this decision it must I think be held that s 52 even as it stood before the amendment could not stand in the way of the exercise of the power given to the High Court under Art 226 or make the exercise of the power ineffective What the amendment in s 52 has done is only this that it has embodied in a sta

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tutory form the result which would have followed even without the amendment If consolidation operations could have been reopened after they had closed under s 52 of the Act, they can certainly be reopened after they have crossed the stage of s 23 It is immaterial that s 23 does not make provision for effectuating orders passed by the High Court under Art 226 as s 42(2) does

There is another consideration in support of this view Orders passed under the provisions of the Act are subject to appeal, by special leave to the Supreme Court under Art 136 of the Constitution and no provision in the Act by conferring finality upon any of them, can take away the power vested in the Supreme Court under the said Article The consolidation authorities are bound to give effect to the orders passed by the Supreme Court in appeal and yet, it will be noticed, even the amended s 52 has not provided as to how the orders of the Supreme Court passed in appeal would affect consolidation operations It is not possible to urge that while an order passed in cases of writs filed under the provisions of the Constitution will have the effect of reopening consolidation operations an order passed by the Supreme Court in appeal under Art 136 against an order passed in consolidation proceedings would have the consolidation operations unaffected and would not have the effect of reopening them in order to give effect to the order The fact that s 23 unlike s 52 does not provide for the reopening of matters which have been confirmed under that section is not, therefore, a matter of any consequence in determining the power of the High Court to interfere, under Art 226, with the orders of the Consolidation authorities even after consolidation operations have crossed the stage of s 23

Further even when consolidation operations have proceeded beyond the stage of s 23 they are liable to be reopened or disturbed under the terms of the section itself as a result of an appeal or a revision before the consolidation authorities It cannot therefore be said that an interference by the High Court upon a writ petition filed before it under Art 226 would unsettle what has become settled and immune from being disturbed

The powers exerciseable by the High Court under Art 226 or a certainly of a different kind from those exerciseable by the Supreme Court in appeal under Art 136 or by the consolidation authorities in appeal or revision under the provisions of the Act itself but the existence of that power cannot be disputed It cannot also in my opinion be disputed that if the High Court does exercise that power the orders passed by it in the exercise of the power have to be carried in to effect and implemented because a power that remains ineffective is no power at all The answer to question 3 must therefore be in the affirmative

OAK, J —I have read the judgment prepared by my learned brother DWIVEDI J I agree that the three questions of law framed by him should be answered in the manner indicated by him

BY THE COURT—These three cases were referred to this Bench for decision The Bench formulated three main questions which arose for decision One of these questions is common to all these cases the second question arises only in Second Appeal No 1443 of 1961 while the third question arises only in the writ petition The questions formulated by this Bench are

(1) Whether in view of the law declared by the Supreme Court in the cases of *The Upper Ganges*

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Sugar Mills Ltd v *Khalil ul Rahman* (1) and *Amba Prasad* v *Mahboob Ali Shah* (2) the decision of the Full Bench in the case of *Ram Dular Singh* v *Babu Sukhu Ram* (3) is not good law ?

(2) Whether an entry of sub tenancy over a part of the holding in the *khasra* of 1356F could confer the *adhivasi* rights under section 20(*b*) of the U P Zamindari Abolition and Land Reforms Act and further whether it is open to the plaintiff to show that such entry was erroneous or not binding and he was actually the sub tenant of the whole of the holding ?

(3) Can this Court interfere in a petition under Art 226 of the Constitution with the orders of the Consolidation authorities after the confirmation of the statement of proposals under s 23 of the Consolidation of Holdings Act by the Settlement Officer (Consolidation) ?

Our answers to these questions are as follows

Answer to question 1 —In the light of the decisions of the Supreme Court in *The Upper Ganges Sugar Mills Ltd* v *Khalil ul Rahman* (1) and *Amba Prasad* v *Mahboob Ali Shah* (2) the decision of the Full Bench in *Ram Dular Singh* v *Babu Sukhu Ram* (3) is not good law

Answer to question 2 —(*a*) If the name of a person is entered in the column of sub tenant in respect of a portion of the plot in the *khasra* of 1356F he would become *adhivasi* of that portion only and no more under s 20(*b*)

(*b*) For the purpose of showing that he is an occupant within the meaning of s 20(*b*) of the U P Zamindari Abolition and Land Reforms Act

(1) 1961 A L J 27 (2) 1964 A L J 605
(3) 1968 A L J 667

it will not be open to the person mentioned in question no 2(a) to show that he was actually the sub tenant of the entire holding It will be open to him to show that he was the sub tenant of the entire holding for any other purpose

Answer to question 3.—The confirmation of the statement of proposals under s 23 of the Consolidation of Holdings Act does not deprive the Court of its power under Art 226 of the Constitution The power remains intact, but the exercise of the power being discretionary the Court may mould its discretion according to the facts and circumstances of each case

The cases should now go back to the learned Judges who have referred them for decision on other points

Question answered

APPELLATE CIVIL (F B)

Before Mr Justice Verma, Mr Justice Pathak and Mr Justice Rajeshwar Prasad

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v

M/s SUKH DIAL RAM BILAS AND OTHERS RESPONDENTS

Code of Civil Procedure, 1908 *O 21 r 90(1) Proviso (b) (as amended in 1937)—Deposit of money or furnishing of security stage— entertain—Meaning of—Application for fixation of amount—Necessity of—Procedure*

Appeal—*Application under O 21 r 90(1)(b) C P C rejected for non compliance—Appeal if lies—Code of Civil Procedure O 43 r 1(j)*

When the Proviso declares that the application shall not be entertained unless the applicant complies with cl (*b*) it refers to the point of time when the application is taken up by the Court for judicial consideration in order to act upon it and in a proper case to require the respondents to show cause against the application being allowed on the grounds contained in it Before that state is reached the applicant must comply with the order made by the court under cl (*b*)

Upon an application being filed under O 21 r 91 the Court must call upon the applicant to establish whether the requirement of cl (*b*) should be dispensed with and if not what according to him should be the amount of deposit or the security to be furnished

An order rejecting an application for setting aside sale even if the rejection is on the ground of non-compliance with cl (*b*) of the Proviso to r 90(1) of O 21 is nevertheless an order to set aside a sale and therefore appealable under O 43 r 1(*j*)

First Appeal From Order No 299 of 1960 from the Order and Judgment of C Mohan Civil Judge Aligarh dated 23rd July, 1960 in Execution No 4 of 1956

K C Saksena, for the Appellant

Ambika Prasad, R R Agarwal and *V K Varman*, for the Respondents

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The following judgment of the Court was delivered by—

PATHAK, J —This is a judgment-debtor's appeal against an order of the learned Civil Judge, Aligarh dismissing his application for setting aside an execution sale

In execution of a decree against the appellant, the executing court auctioned the appellant's immovable property on 6th May, 1958 On 28th May, 1958, the appellant filed an application under O 21 r 90 of the Code of Civil Procedure for setting aside the sale The decree holder respondent filed a reply on 25th July 1958 opposing the application and thereafter a similar reply was filed by the auction-purchaser respondent On 8th November, 1958 the application under O 21, r 90 was dismissed in default, but was restored on 6th February 1960 On 27th April 1960 the appellant applied for permission to file a report and a map in support of his application Permission was granted on 30th April, 1960 About the same time, he applied for permission to make a deposit or furnish security as required by cl (*b*) of the Proviso to sub-r (1) of r 90 The learned Civil Judge made an order on 23rd July 1960 declining to grant permission on the ground that the appellant had not made any deposit nor moved the Court for fixing its amount at the time when he filed the application under O 21, r 90 and more than two years had elapsed since then By the same order, the learned Civil Judge rejected the application under O 21 r 90 as not maintainable The instant appeal has been preferred against the order

The appeal came on for hearing originally before a Division Bench consisting of JAGDISH SAHAI and W BROOME, JJ Being of the opinion that a conflict existed between the decisions of this Court on the point,

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they have referred the case to a larger Bench That is how the case comes before us

O 21, r 90 was amended by this Court with effect from 1st June, 1957 The amended provision reads

R 90 (1) Where any immovable property has been sold in execution of a decree, the decree holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it

Provided that no application to set aside a sale shall be entertained—

(*a*) upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up, and

(*b*) unless the applicant deposits such amount not exceeding twelve and half per cent of the sum realised by the sale or furnishes such security as the Court may in its discretion, fix except when the Court for reasons to be recorded dispenses with the requirements of this clause

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied, that the applicant has sustained substantial injury by reason of such irregularity of fraud

(2) Where such application is rejected the Court may award such costs to the decree holder or the auction purchaser or both as it may deem fit and such costs shall be the first charge upon

the security referred to in cl (*b*) of the proviso, if any '

In their construction of cl (*b*) of the Proviso the decisions of this Court have shown considerable divergence

In *Bawan Ram* v *Kunj Behari Lal* (1) a learned Single Judge held that the requirements of cl (*b*) must be satisfied either at the time when the application for setting aside the sale is filed or in any event before the expiry of the period of limitation for making such application There was no power in the Court, he pointed out to extend the period of limitation for filing the application and therefore if compliance with cl (*b*) was not made with in that period the application had to be rejected as invalid

In the next case, *Dhoom Chand Jain* v *Chaman Lal Gupta* (2), DESAI, C J and DWIVEDI, J observed that no duty lay upon the Court to fix the amount of deposit or of security of its own accord but pointed out that although it could not refuse to take an application even though not backed by a deposit or security it could not judicially consider it and while it was expected that the Court would ordinarily give an opportunity to the applicant to comply with cl (*b*) it would reject the application if there was no compliance

This was followed by the view expressed by MUKERJI and UNIYAL, JJ in *Kundan Lal* v *Jagan Nath Sharma* (3) where disagreeing with the statement of the law in *Bawan Ram's case* (1) they held that compliance with cl (*b*) may be made at any time before the application under O 21 r 90 comes on before the Court for decision on merits

The next case, in order of time is *Dullo* v *Devi Charan* (4) This decision was rendered by SRIVASTAVA and KATJU, JJ They adopted the view that al

(1) A I R 1962 All 42
(2) A I R 1962 All 848
(3) A I R 1963 All 647
(4) 1963 A L J 759

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though it was not imperative that the deposit should be made or the security should be furnished before or simultaneously with the making of the application under O 21 r 90, it was necessary that that should be done before the expiry of the period of limitation for making the application It appears from the judgment that the attention of the learned Judges was not invited to the decisions in *Dhoom Chand Jain's* case (1) and *Kundan Lal's case* (2)

In *Haji Rahim Bux* v *Firm Samiullah and Sons* (3), the controversy was considered in separate but concurring judgments by DESAI, C J and SINGH, J They declared that the question of fixing the amount or the security would arise only after the application under O 21, r 90 was presented to it that the period within which compliance should be effected was not the period of limitation for making the application under O 21, r 90 but such period as was fixed by the Court in that behalf and that such compliance must be had before the application was considered on merits

The same view was taken by ASTHANA, J in *Mahavir Singh* v *Gauri Shankar* (4) and he described the observations to the contrary in *Dullo's* case (5) as *obiter*

Finally, we reach the decision in *Smt Jaggi* v *Ram Autar* (6), where BISHAMBHAR DAYAL and SETH, JJ reiterated the position that an application under O 21, r 90 could be entertained if the amount was deposited or the security furnished before the final hearing and disposal of the application

The Bench which has referred this case has also adverted to *Commissioner of Income Tax* v *Filmistan*

(1) A I R 1962 All 543
(2) A I R 1962 All 547
(3) A I R 1963 All 330
(4) A I R 1964 All 389
(5) 1962 A L J 759
(6) 1965 A L J 1185

Ltd, (1), where the Supreme Court held that upon the words of the proviso to s 30(1) of the Income Tax Act 1922 that 'no appeal shall lie against an order of penalty for failure to pay the tax demanded unless the tax has been paid the appeal would be held to be properly filed only on the day on which the tax was paid

The appellant contends that the word entertain in cl (*b*) refers to the stage when evidence has been let in and the application is taken up for oral argument The case of the respondents is that the application is entertained when it is received by the Court and that compliance with cl (b) must be effected at the time when the application is filed in Court or at the latest before the expiry of the period of limitation for filing the application The truth as so often appears in contentious litigation, lies somewhere between these two extreme positions

O 21 r 90 contemplates an application to the Court for setting aside the sale of immovable property in execution of a decree But no such application can be entertained by the Court (*a*) upon any ground which was available to the applicant on or before the date on which the sale proclamation was drawn up and (*b*) unless the applicant deposits an amount or furnishes such security as the Court may fix except when the Court dispenses with the requirements of the clause The Proviso contains two clauses, each of which affects the jurisdiction of the Court to entertain the application Whereas cl (*a*) is a provision of limitation carving out the grounds upon which the application shall not be entertained and therefore referring to the content of the application cl (*b*) speaks of certain conditions to be fulfilled by the applicant before the application can be entertained The subject of the two clauses is wholly dissimilar although converging to a common purpose One deals with what is involved in

(1) AIR 1961 SC 1136.

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side the application the other with matters outside its substance In addition, there is a further plane in which the construction of cl (*b*) is involved That concerns its relationship in time What is the period within which the applicant must comply with cl (*b*) to enable the Court to entertain his application ? It is this question which has excited controversy and the answers to which have so far ranged over a wide spectrum

The clause declares that no application shall be entertained unless the applicant complies with clause (*b*) When is an application "entertained ? Murray's New English Dictionary defines entertain to mean to admit to consideration (an opinion argument request proposal etc) to receive (an idea) into the mind'

The respondents say that cl (*b*) obliges the applicant to comply with its requirements at the time when the application is filed, and that is what the use of the word entertain points to They rely on the observations of the Supreme Court in *Samarth Transport Co* v *The Regional Transport Authority* (1) that the word entertain' may mean to receive on file or keep on file Now the Supreme Court had before it a very different provision, namely s 68 F of the Motor Vehicles Act 1939 That provision as the Supreme Court specifically pointed out did not connote any time but only described the scope of the duty under it It also observed that the meaning given to it was one necessitated by the context in which the provision occurred The Supreme Court held that when the Regional Transport Authority came to know that there was an approved Scheme under the Act, and to give effect to it an application for renewal of a permit could not be entertained, the Authority could decline to receive such application on the file and if an application had already been received, to refuse to keep it on the file ' It can only

(1) A I R 1961 S C 98 97

mean that the Authority cannot dispose of the application on merits but can reject it as not maintainable It is difficult to see how these observations can be of any assistance to the respondents before us

Reference has also been made to *Khatumal* v *Abdul Qadir* (1) where construing s 110 F of the Motor Vehicles Act, 1939, the High Court of Madhya Pradesh took the word "entertain to mean to receive and take into consideration' But the language of s 100 F necessitates a connotation prohibiting the reception of the claim at the inception of the proceeding, and, as will be presently shown, the considerations coming into play in the construction of cl (*b*) before us indicate a different context.

The respondents placed great reliance upon *Commissioner of Income Tax* v *Filmistan Ltd* (2) It is pertinent to note that the Supreme Court was not called upon to consider the implications of the word entertain in that case The language employed in the proviso to s 30(1) of the Indian Income Tax Act 1922, affords no analogy to cl (*b*) of the proviso to O 21, r 90 That 'no appeal shall lie' was construed by the Supreme Court to mean that no memorandum of appeal can be presented And what is significant, and marks an important difference from the case before us, is that in respect of s 30(1) the filing of the appeal is conditioned by a requirement which the appellant can fulfil without reference to the appellate authority Upon the same considerations, the decision of the High Court of Andhra Pradesh in *Rajah of Venkatayerh* v *Commissioner of Income tax* (3) which was also concerned with the proviso to s 30(1) of the Indian Income Tax Act, 1922, can be of little value to the understanding of the problem before us.

(1) A I R. 1962 M P 395 (2) A I R 1961 S C. 1136.
(3) A.I.R. 1957 A P 976

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The Proviso to sub r (1) of r 90 does not contain any specific provision as to the period during which the applicant must comply with cl (*b*) But a period definite in point of time must necessarily be envisaged in order to terminate the proceedings and bring the execution to that reasonably early conclusion which is the aim and purpose of the legislation and the ambition of the decree holder In the absence of specific provision in that behalf it is necessary to spell it out from the context in which cl (*b*) stands and the object with which it has been enacted

A person desiring to avail of the remedy provided by O 21 r 90 must invoke the jurisdiction of the Court by making an application Cl (*b*) prohibits the Court from entertaining the application unless the applicant either deposits an amount or furnishes security, except when the Court dispenses with the requirements of the clause The amount to be deposited or the security to be furnished is fixed by the Court At the time of filing the application, it is not possible for the applicant to know what is the amount to be deposited or the security to be furnished and, indeed, whether the requirements of the clause will be dispensed with by the Court There is no obligation upon him to deposit any amount or to furnish any security until there is an order of the Court in that behalf fixing the amount of the deposit The clause does not fix the amount of the deposit It is the Court which must fix that amount The clause merely specifies the maximum of the amount to be fixed by the Court If the applicant were to deposit any amount, even if it was twelve and half per cent of the sum realised by the sale he would not be complying with the clause at all The deposit must be pursuant to an order of the Court made under the clause Moreover to contemplate that the applicant should deposit twelve and a half per cent of the sum

realised by the sale or furnish security at the time of filing the application may result in imposing serious hardship and indeed drive him to irreparable loss There may well be a case where patently the sale should be set aside and where it is beyond the means of the applicant to comply with cl (*b*) In such a case the Court could dispense with the requirements of the clause When the Court is authorised to dispense with the requirements of the clause or if it does not do so to fix the amount of the deposit or the security it can arrive at its determination only upon an application presented before it It must have material before it for the purpose of making that order All this neces sarily envisages a stage in the proceeding after the ap plication has been filed

Where the Legislature requires that a person should do something at the time of applying to the Court in order that the application should be a proper applica tion it gives clear indication to that effect S 7 B(7) of the U P (Temporary) Control of Rent and Evic tion Act, 1947, entitles a tenant to file an objection in reply to a notice calling upon him to pay arrears of rent, and the proviso declares that—

> 'The tenant shall not be permitted to file any objection unless he has deposited in Court the amount mentioned in the notice or furnishes secu rity to the satisfaction of the Court

Then there is s 17(1) of the Provincial Small Cause Courts Act, the Proviso to which runs—

> Provided that an applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall at the time of presenting his ap plication either deposit in the Court the amount due from him under the decree or in pursuance of the judgment or give such security for the per

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formance of the decree or compliance with the judgment as the Court may on a previous application made by him in this behalf have directed These are examples plain enough They point to the legislative practice adopted whenever it is envisaged that a condition must be fulfilled by the applicant at the time of filing his application

Reference may also be made to the corresponding proviso introduced in sub r (1) of O 21, r 90 by the Patna High Court which as it read before 1942 provided—

> "Provided that no application to set aside the sales shall be admitted unless
>
> (*a*)
>
> (*b*) the applicant deposits with his application such amount not exceeding twelve and half per cent of the sum realised by the sale or such other security as the Court may, in its discretion fix unless the Court for reasons to be recorded, dispenses with the deposit

A Full Bench of that Court considered the provision in *Brij Behari Lal* v *Firm Srinivas* (1) and upon a consideration of the extraordinary results which would ensue if the provision was construed to require the applicant to comply with the clause at the time of filing the application held that compliance with the clause could be affected at any time before the application came on for admission It is apparent that the construction of the clause was prompted by the necessity of giving a reasonable interpretation in order to make the provision workable

In construing a statutory provision the Court must give to the provision a meaning which promotes the

(1) A I R 1938, Pat 248 (F B)

smooth working of the statute and must avoid a construction which tends to defeat the object for which it has been framed It must also bear in mind that the Legislature does not expect a party upon whom the statute imposes a duty to do the impossible A realistic appreciation of situations and circumstances proceeding from the proposed construction must always be before the Court

"The respondents urge that in any event after the application has been presented it is incumbent on the applicant to make another application requesting the Court to fix the amount to be deposited or the security to be furnished or to make an order dispensing with the requirements of cl (*b*) The Court, it is said, cannot make an order under cl (*b*) unless the applicant has placed relevant material before it It is said that in order to avail of the remedy provided by O 21 r 90 the applicant must do all that is necessary to perfect his application and the application is an imperfect one so long as there is no compliance with cl (*b*) It is also pointed out that unless an application is made to the Court for making an order under cl (*b*) the Court cannot of its own motion assume jurisdiction In the instant case jurisdiction was assumed by the Court when the applicant made an application under O 21 r 90 for setting aside the sale The question whether it was necessary for him to make a further application inviting the Court to make an order under cl (*b*) must be determined by reference to the provisions of that clause There is nothing in the language of cl (*b*) which imposes a duty upon the applicant to make such application Cl (*b*) casts a duty upon the Court to make an order fixing the amount to be deposited or the security to be furnished or dispensing with the requirements of the clause The applicant, by

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making the application for setting aside the sale has set in motion the judicial process Before the Court can entertain the application it must strike off the fetters imposed by the Proviso upon the exercise of its jurisdiction When there is no obligation upon the applicant to make an application to the Court for an order under cl (b), clearly a duty lies with the Court to take proceedings enabling it to make that order The Court is a vital and necessary institution in a progressive social order In the administration of the legal process under a democratic constitutional system though functioning within the limits of the law it has positive functions to perform It is true that the Court will not invite the parties to seek an adjudication of their rights by it and that it is necessary for a party to expressly move the Court in that behalf But it is not inconceivable that upon its jurisdiction being invoked by a party a situation may arise where the Court must take the initiative in order that conditions be created for ensuring a continuity in the exercise of that jurisdiction, especially when the law places no obligation upon the party invoking its jurisdiction to do so

In this view of the matter when there is no obligation upon the applicant to apply to the Court for an order under cl (*b*) no question can arise as to whether the applicant must approach the Court for that purpose within the period of limitation prescribed for making the application for setting aside the sale

Therefore, after the application for setting aside the sale has been presented it is for the Court to take appropriate steps enabling it to make an order under cl (*b*)

When should the Court do so? The contention of the appellant is that compliance with cl (*b*) is contemplated at the stage after evidence has been let in and the application is taken up for consideration on its

merits The appellant urges that cls (*a*) and (*b*) of the Proviso are governed by the same opening words of the Proviso, Provided that no application to set aside a sale shall be entertained— and therefore necessarily refer to the same point of time And inasmuch as the provisions of cl (*a*) will be considered only when the application is taken up for consideration after evidence has been admitted, when the Court will examine the grounds upon which the application is based, so also it is at that stage that the Court will take steps for mak ing an order under cl (*b*) The submission rests on a fallacy As has been pointed out earlier in this judg ment, the subject of the two clauses is not the same in nature and while the Court may consider the provisions of cl (*a*) at any stage, compliance with cl (*b*) is fixed by virtue of contextual considerations to a definite point of time Moreover to accept the contention of the appellant would be to permit an applicant to defeat the object behind the enactment of cl (*b*) The ob ject of cl (*b*) is, among other things to safeguard the interest of the decree holder and the auction purchaser who may incur costs in opposing the application That is clear from sub r (2) which provides that upon re jection of the application, the Court may award costs to them and such costs shall be the first charge upon the security referred to in cl (*b*) of the Proviso That would necessarily imply that compliance with cl (*b*) should be effected before the application has pro ceeded to the stage of trial and indeed, before the decree holder or the auction purchaser have suffered costs in taking proceedings to resist the application on the issues raised by it In order that the purpose of sub r (2) should be achieved and the deposit made or the security furnished under cl (*b*) should protect the decree holder and the auction purchaser against a rivolous or vexatious application, that is the stage

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before which the applicant must comply with cl (*b*) There could conceivably be a case when a judgment debtor or other applicant, whose application has proceeded well on its way to trial, realises the weight of the material brought on the record against the application, and, anticipating its failure, ceases to prosecute it and decides not to comply with cl (b) In that event, a decree holder or auction purchaser who has already suffered heavy expenses in opposing the application will be deprived of the protection otherwise assured to him if compliance with the clause had been effected

Upon the aforesaid considerations, it is clear that when the Proviso declares that the application shall not be entertained unless the applicant complies with cl (*b*), it refers to the point of time when the application is taken up by the Court for judicial consideration in order to act upon it and, in a proper case, to require the respondents to show cause against the application being allowed on the grounds contained in it Before that stage is reached the applicant must comply with the order made by the Court under cl (*b*)

In my judgment, upon an application being filed under O 21, r 90 the Court must call upon the applicant to establish whether the requirements of cl (*b*) should be dispensed with, and if not, what according to him, should be the amount of deposit to be made or the security to be furnished It should appoint a date upon which the applicant can produce evidence on the basis of which he claims either that the requirements of the clause should be dispensed with or, according to him what should be the amount to be deposited or the security to be furnished That date need not fall within the period of limitation prescribed for an application under O 21 r 90 Before making the order under cl (*b*) the Court should afford an opportunity

to the parties in the execution proceeding who may be affected by such order to be heard in the matter Where the Court decides not to dispense with the requirement of cl (*b*), it will make an order fixing the amount to be deposited by the applicant or the security to be furnished by him, and will specify a period within which compliance must be made by the applicant Upon the making of that order the applicant is under a duty to comply with it, and if he does not his application for setting aside the sale is liable to be dismissed

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An objection was raised by the respondents to the maintainability of this appeal It was urged that no appeal lies against the order of the learned Civil Judge because it does not amount to an order refusing to set aside the sale An order rejecting an application for setting aside a sale, even if the application is rejected on the ground that the requirements of cl (*b*) of the Proviso have not been satisfied, is nevertheless an order refusing to set aside the sale In *Marudamuthu Mudaliar* v *N K Venkatrama Ayyar* (1) VARADACHARIAR, J held that even if the application was rejected before it could be admitted the order of rejection was an order refusing to set aside the sale and an appeal lies under O 43 r 1(*j*) In *Ram Pratap Mandal* v *Triloknath* (2) an order dismissing an application for setting aside a sale under O 21, r 90 for want of prosecution was held by the Patna High Court to fall within O 43 r 1(*j*) and was, therefore, appealable and it was pointed out that there was no difference for the purposes of O 43, r 1(*j*) between dismissing the application for want of prosecution and dismissing it on merits In *Sheikh Mastan* v *Gubba Atchayya* (3) the High Court of Andhra Pradesh held that an order dismissing an application made under O 21, r 90 on the ground of

(1) A I R 1939 Mad 488 (2) A I R 1957 Pat 463
(3) A I R 1959 A P 667

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failure to deposit an amount equal to that mentioned in the warrant of sale as directed by the Court under the Proviso to that rule amounted to a refusal to set aside the sale within the meaning of O 43 r 1(*j*) It does appear that an appeal lies against the order of the learned Civil Judge But it is not necessary to express any final opinion in this behalf because the appellant has prayed that the appeal may be converted into a revision application and he has made good the deficiency in the court fee There is no dispute that if an appeal does not lie a revision application will lie against the order of the learned Civil Judge

The appeal is allowed The order of the learned Civil Judge is set aside and he is directed to dispose of the appellant's application for setting aside the sale in accordance with law and in the light of the observations set out in this judgment The appellant is entitled to his costs

Appeal allowed

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Wanchoo and the Hon'ble Mr Justice Bhargava

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RAGHURAJ SINGH (IN BOTH THE APPEALS) (APPELLANT)

v

MURARI LALL AND OTHERS (IN BOTH THE APPEALS) (RESPONDENTS)

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

U P Zamindar's Debt Reduction Act, (XV) *of* 1953 *ss* 3 *and* 4—*Charge by a decree in a suit on promissory note—Whether a secured debt liable to reduction*

A debt secured by a charge will be a secured debt for the purposes of the Zamindars Debt Reduction Act provided the charge was there before the date of the suit Accordingly where the decree in a suit on promissory note created a charge on certain villages belonging to the judgment debtor it could not in execution proceedings be considered to be a secured debt liable to reduction within the meaning and for the purposes of ss 3 and 4 of the Act

Civil Appeals Nos 952 and 953 of 1964 from the Judgment and Order dated the 24th July, 1961 of the Allahabad High Court in Execution First Appeal No 440 of 1953 and Civil Revision No 1402 of 1953

C B Agarwala (*K P Gupta* with him), for the Appellant

S P Sinha (*S Shaukat Hussain* with him) for the Respondent No 1

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RAGHUNAJ SINGH v. MURARI LALL

The following judgment of the Court was delivered by—

WANCHOO, J —These are two connected appeals by special leave from a common judgment of the Allahabad High Court The facts necessary for present purposes may be briefly indicated The appellant borrowed some money on a promissory note from the respondents predecessors The suit was filed by the respondents on the basis of the promissory note and a decree for Rs 2,71,000 and odd was passed against the appellant The decree provided for 20 instalments payable half yearly The decree also provided for one or more instalments for *pendente lite* and future interest beyond the twentieth instalment The first instalment was payable in November 1938 and thereafter each instalment was payable on or before 31st July and 31st December each year There was also a default clause providing that in case there were three defaults in the payment of instalments the whole decree could be executed Finally the decree created a charge on 18 villages belonging to the appellant It may be added that the charge was created under s 3 of the U P Agriculturists Relief Act, No XXVII of 1934 The appellant paid the first 17 instalments in time He paid the eighteenth instalment on 13th July 1948 but this was late as by then the 20th instalment had also fallen due As the 19th and 20th instalments as well as *pendente lite* and future interest had not been paid the decree was put in execution by the respondents on 26th April 1951 for recovery of Rs 49 000 and odd by the sale of a *kothi* and an *ahata* belonging to the appellant The decree holder respondent also prayed that in case the whole amount was not realised from the sale of the above property, zamindari property on which a charge had been created might be put to sale

The appellant raised objections under s 47 of the Code of Civil Procedure against the execution He

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Wanchoo J

also filed an application under ss 4 and 8 of the U P Zamindari s Debt Reduction Act No XV of 1953 (here inafter referred to as the Act) It is unnecessary to refer to the objections in details for in the present appeals we are concerned only with one point namely whether s 4 of the Act applies to the present case Under that section the appellant had applied to the court which passed the decree to reduce the amount as provided therein Further in his objection under s 47 of the Code of Civil Procedure the appellant claimed the same relief That is how there were two proceedings in the first court one under s 4 of the Act and the other an objection under s 47 of the Code of Civil Procedure The first court held that s 4 of the Act did not apply In consequence it held that the amount for which execution had been taken out was not liable to reduction It therefore dismissed both the application under s 4 as well as the objection under s 47 of the Code of Civil Procedure There was also a question of limitation but we are not concerned in the present appeals with that question

This gave rise to two proceedings before the High Court The appellant went in appeal against the dismissal of his objection under s 47 of the Code of Civil Procedure He also filed a civil revision against the dismissal of his application under s 4 of the Act The two matters were heard together by the High Court which held that s 4 did not apply and therefore the amount could not be reduced The High Court having refused to grant leave to the appellant he secured special leave from this Court and that is how the matter arises before us

The Act was passed in 1953 to give relief to zamindars whose lands had been acquired by the State under the U P Zamindari Abolition and Land Reforms Act

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Wanchoo J

No I of 1951 S 2 defines certain terms out of which it is necessary to refer to the following —

(m) secured debt means a debt secured by mortgage of an estate and other immovable property

'(t) mortgage with its cognate expressions shall have the meaning assigned to it in the Transfer of Property Act, 1882 and includes a charge as defined in s 100 of that Act, '

(o) suit to which this Act applies means any suit or proceeding relating to a debt whether secured or otherwise,

"(e) decree to which this Act applies means a decree passed either before or after the commencement of this Act in a suit to which this Act applies,"

' (f) debt means an advance in cash or in kind and includes any transaction which is in substance a debt but does not include an advance as aforesaid made on or before the first day of July 1952 ' Certain debts are exempt from this definition but we are not concerned with them in the present appeals

It will be seen from these definitions that a decree in a suit based on any debt is a decree to which the Act applies and such decrees can be of two kinds namely, (i) those based on a secured debt, and (n) those based on an unsecured debt A secured debt is a debt secured by mortgage and includes a debt secured by a charge under s 100 of the Transfer of Property Act

Then comes s 8 which provides for reduction of debt at the time of passing of decree Sub s (1) thereof lays down that ' notwithstanding anything in any law agree-

1907

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Banerjee J.

ment or document in any suit to which this Act applies relating to secured debt the court shall after the amount due has been ascertained but before passing a decree proceed as hereinafter stated Then follow provisions as to the manner in which the debt would be reduced but we are not concerned with the details thereof Section 3 therefore applies to a case where a decree relating to a secured debt had not been passed before the Act came into force In such a case the court passing the decree has to reduce the amount in the manner provided in that section It is however clear that before the court can act under s 3, it has to come to the conclusion that the debt in question is a secured debt i e a debt secured by a mortgage or a charge under s 100 of the Transfer of Property Act The mortgage or the charge must be there on the date of the suit and the suit must be with respect to a secured debt The date therefore on which the court has to see whether the debt in the suit before it is a secured debt or not is the date on which the suit is filed The High Court seems to be in error when it held that under the definition of 'secured debt' only such debts as are secured by a mortgage come in and not debts which are secured by a charge It seems to have overlooked that part of the definition of the word 'mortgage' which lays down that a mortgage will include a charge as defined in s 100 of the Transfer of Property Act Therefore even though a debt may be secured by a charge it will be a secured debt for the purpose of s 3 provided the charge was there before the date of the suit We have referred to s 3 in some details because we are of opinion that the interpretation to be put on s 3 will have a direct bearing on the interpretation of the words of s 4 where also the material words are the same as in s 3

S 4 provides for reduction of debts after passing of decrees, and sub s (1) thereof reads thus

Shiv Raghuraj Singh v. Mukand Lal Haachoo J.

(1) Notwithstanding anything in the Code of Civil Procedure 1908 or any other law, the court, which passed a decree to which this Act applies relating to a secured debt, shall on the application either of the decree holder or judgment debtor, proceed as hereinafter stated

Then come provisions as to the reduction of debt but we are not concerned with the details thereof

The question that has been posed before us is the meaning of the words a decree relating to a secured debt The comparable words in s 3 are a suit relating to a secured debt As we have already said, so far as s 3 is concerned it is the date on which the suit is filed which has to be seen to determine whether the suit relates to a secured debt as defined in the Act It has been urged on behalf of the appellant that s 4 applies undoubtedly to a case where the debt was a secured debt at the time the suit was filed But it is further urged that in an application under s 4, the court may also take into account the fact that though the debt may not have been a secured debt on the date the suit was filed in which the decree was passed the decree having created a charge the debt becomes secured and the decree relates to a secured debt, the relevant date in such a case being the date on which the application under s 4 has been made to the court It is said that the words a decree relating to secured debt means a decree which has secured a debt whether the debt was secured before the suit was filed or not

We are of opinion that this meaning cannot be given to the words a decree relating to a secured debt We have already indicated that the comparable words in s 3 are the same and there the words a suit relating to a secured debt clearly mean a suit which is

based on a debt which was secured before the suit was filed On the same reasoning when s 4 speaks of a decree relating to a secured debt it means a decree passed in a suit which was based on a secured debt as on the date of the suit The Legislature could not have intended by using these words in s 4 that the fact that the decree created a charge should result in converting what was an unsecured debt into a secured debt for the purpose of s 4 It seems to us that if one were to ask in a case of this kind whether the decree related to a secured debt or not the answer would clearly be that the decree does not relate to a secured debt but to an unsecured debt based on a promissory note It is true that the decree itself created a charge but that is very different from saying that the decree relates to a secured debt We have no doubt that if the Legislature intended that a decree which relates to an unsecured debt but which itself creates a charge for any reason would also be covered by s 4 it would have used different and appropriate words to convey that idea Thus to our mind as the words suit relating to a secured debt mean a suit relating to a debt which was secured on the date the suit was filed a decree relating to secured debt must also mean the same things i e decree in respect of a debt which was secured when the suit in which the decree was passed was filed The mere fact that the decree created a charge for certain reasons as in this case under the U P Agriculturists Relief Act is no reason for holding that the decree relates to a secured debt Whether the debt was secured or otherwise is a matter which in our opinion has to be tested both for s 4 as well as for s 3 on the date the suit is filed If on that date the debt was secured the suit would be relating to a secured debt and so would be the decree which might later be passed in that suit But if on the date of the suit the debt was not secured it cannot be

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said that the decree related to a secured debt simply because the decree created a charge for some reason or other We are therefore of opinion that the High Court was right in the view it took that this case was not covered by s 4 of the Act

The appeals therefore fail and are hereby dismissed with costs—one hearing fee

Appeal dismissed

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Shah the Hon'ble Mr Justice Sikri and the Hon'ble Mr Justice Ramaswami

1967

April 6

RAJA MOHAN RAJA BAHADUR (APPELLANT)

v

COMMISSIONER OF INCOME TAX U P

(RESPONDENT)

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Income Tax Act, (*XI of*) 1922 s 4—*U P Encumbered Estates Act* (*XXI of* 1934) s 27—*Receipt of Encumbered Estates Bond—Whether amounts to receipt of money payable or received thereunder—Taxability of*

It commercial assets are received—be it under a consensual arrangement or by operation of law—by a trader maintaining accounts on cash basis in satisfaction of an obligation income which is embedded in the value of the assets is deemed to be received the receipt of income is not deferred till the asset is realized in terms of cash or money

By issuing the Encumbered Estates Bond to the creditor the Government undertook a fresh obligation in substitution of the original liability of the debtor which thereupon stood extinguished The Government had no doubt the right to recover the amounts due under the bond from the landlord (debtor) but the Government did not on that account become agent of the landlord for payment of the debt its liability to the holder of the bond being independent of its ability to recover the same from the landlord

Accordingly the receipt of the Encumbered Estates Bonds is tantamount to receipt of income in that very year so as to be taxable in the following assessment year irrespective of the period of the realization of money in lieu of the same

Civil Appeal No 1395 of 1966 from the Judgment and Decree dated the 10th July, 1962 of the Allahabad High Court in Income Tax Reference No 115 of 1959

99 sp

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RAJA MOHAN RAJA BAHADUR

v.

COMMISSIONER OF INCOME TAX U. P.

Bishan Narain (*Govind Saran Singh* with him) for the Appellant

T. V. Vishwanath Iyer (*R. Ganapathy Iyer* and *S. P. Nayyar* for *R. N. Sachthey*, with him) for the Respondent

The following judgment of the Court was delivered by—

SHAH, J.—The appellant a Hindu undivided family carries on the business of money lending and maintains its accounts on cash basis. The appellant commenced an action in the Civil Court for a decree for recovery of Rs 2,58,000 due by Nisar Ahmad Khan Taluqdar of Mohana Estate. The action was carried to the Judicial Committee of the Privy Council and was ultimately decreed in favour of the appellant. Nisar Ahmad Khan then obtained under the U. P. Encumbered Estates Act 25 of 1934 an order applying the provisions of the Act to him. The Special Judge Sultanpur passed an order for payment of Rs 5,00,992 to the appellant. Pursuant to the order the appellant received in 1946 Rs 1,54,692 from the debtor and for the balance the Government of the United Provinces gave to the appellant Encumbered Estates bonds of the face value of Rs 3,46,300. The amount received in the year 1946 was appropriated by the appellant towards the principal due. The appellant split up the amount of the face value of the bonds into two sums of Rs 2,22,097 9 11 and Rs 1,24,302 6 1 and credited the first amount in the books of account towards the balance of principal and the second amount to an account styled Interest Accrued. In submitting the return of his taxable income for the assessment year 1948-49 the appellant did not disclose any receipt of income from interest due on the loans advanced to Nisar Ahmad Khan. The appellant was duly assessed to tax on the income disclosed by him. In October

1948 the appellant sold the Encumbered Estates Bonds and realized a total sum of Rs 3,21 600 and disclosed in the return for the assessment year 1949 50 as interest received during the year of account the difference between the amount realized by sale of the bonds and the amount due as principal The Income tax Officer issued a notice under s 34(1)(a) of the Indian Income Tax Act and brought to tax the difference between the face value of the bonds and the amount due as principal as escaped income of the previous year relevant to the assessment year 1948 49 The order was confirmed by the Appellate Assistant Commissioner and the Income tax Appellate Tribunal The Tribunal then submitted three questions to the High Court of Judicature at Allahabad of which the following were canvassed before us

> (2) Whether the receipt of Encumbered Estates Bonds during the previous year 1947 48 amounted to receipt of cash during that previous year and not during the previous year 1948 49 when the Bonds were in fact sold at less than their face value?
>
> (3) Whether in the circumstances of the case the mere receipt of the Encumbered Estates Bonds was tantamount to receipt of income assessable in the year 1948 49?

The High Court answered the questions in the affirmative Against the order passed by the High Court with certificate the appellant has appealed to this Court

The scheme of the U P Encumbered Estates Act 25 of 1934 and the form of the bonds issued in satisfaction of the liability of the debtors may be briefly summarised Under the U P Act a landlord may apply to the Collector stating the amount of his debts and requesting that the provisions of the Act be applied to him The

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Shah J

Collector entertains the petition and transfers it to the Special Judge The landlord then submits a written statement giving the list of his creditors and the list of his assets Notices are published by the Special Judge and the creditors called upon to submit their written claims On the claims for debts secured or unsecured duly proved simple money decrees are passed in favour of the creditors The Special Judge then determines the properties belonging to the landlord and prepares a list of the properties and a list of the debts adjudged to be due by the landlord ranking the same in order of priority and then sends the decrees to the Collector for execution If the amount due by the debtor is less than the instalment value of his proprietary rights in land the Collector is enjoined to direct the landlord to pay with land revenue dues such amount to the Provincial Government in instalments with future interest at a rate determined by the Provincial Government If the Collector has proceeded under s 27 he has to give to each creditor a bond or bonds bearing interest at the prescribed rate for the amount due to him payable in instalments within a period not exceeding 20 years The form of the bond is as follows

> The Governor of the United Provinces hereby promises to pay to or order at any Treasury in the United Provinces or at the General Treasury at Fort William or at Bombay on the day of 19 on the application of the holder or earlier at the entire option of the Government of the United Provinces the sum of and in the meantime to pay at the said Treasury interest on such sum at the rate of three and one quarter per cent per annum, such interest to be paid half yearly on the 20th day of February and the 20th day of August in every year, commencing from the

20th day of 19 , , on which date the whole interest due from the date hereof shall be paid"

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Shah J

On 26th February 1948 the appellant received Encumbered Estates Bonds of the face value of Rs 3,46 800 The appellant appropriated bonds of the face value of Rs 2 22,097 9 11 towards the principal and costs due, and appropriated the remaining bonds of the value of Rs 1 24 202 6 1 towards interest accrued due in the debtor's account The departmental authorities and the Tribunal held that the receipt by the appellant of bonds of the face value exceeding the principal amount of the debt due constituted receipt of interest The High Court agreed with that view

Counsel for the appellant submitted that the accounts maintained by the appellant being on cash basis until the appellant realised the value of the bonds no interest was received by the appellant Counsel asserted that when a trader maintains account on cash basis receipt of money alone may be taken into account in determining the taxable income In the alternative Counsel urged that the bond issued by the Government under the U P Encumbered Estates Act merely amounted to promise by an agent of the debtor to pay the amount of the bond in instalments and by receiving the bonds incorporating such a promise no money or money's worth is received by the creditor

Under s 4 of the Income Tax Act 1922 the total income of any previous year of a resident assessee includes all income profits and gains from whatever sources derived which are received or are deemed to be received in the taxable territories in such year by or on behalf of such person or accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year or accrue or arise to him without the taxable

The Rani Mohan Roy Bahadur v. Commissioner of Income Tax U. P. Shah J.

territories during such year or having accrued or arisen to him without the taxable territories before the beginning of such year and after the 1st day of April 1938 are brought into or received in the taxable territories by him during such year The Act does not contain much guidance as to cases in which tax is to be levied on income received and cases in which tax is to be levied on income accrued or arisen S 13 however requires that income profits and gains for the purposes of ss 10 and 12 shall be computed in accordance with the method of accounting regularly employed by the assessee If accounts are maintained according to the mercantile system whenever the right to receive money in the course of a trading transaction accrues or arises even though income is not realised income embedded in the receipt is deemed to arise or accrue Where the accounts are maintained on cash basis receipt of money or money s worth and not the accrual of the right to receive is the determining factor Therefore if commercial assets are received by a trade maintaining accounts on cash basis in satisfaction of an obligation income which is embedded in the value of the assets is deemed to be received the receipt of income is not deferred till the asset is realized in terms of cash or money It makes no difference whether the receipt of assets is in pursuance of an agreement or that the trader is compelled by law to accept the assets from the debtor Once title of the trader to an asset received is complete whether by a consensual arrangement or by operation of law he receives the income embedded in the value of the asset In *Californian Copper Syndicate (Limited and Reduced)* v *Harris (Surveyor of Taxes)* (1) Lord TRAYNER in dealing with a case of assessment to income tax of a Company formed for the purpose, *inter alia*, of acquiring and reselling mining property resold the whole of its assets to a second Company and received

(1) 5 T C 159

payment in fully paid shares of the purchasing Company observed

> A profit is realised when the seller gets the price he has bargained for No doubt here the price took the form of fully paid shares in another company, but, if there can be no realised profit except when that is paid in cash, the shares were realisable and could have been turned into cash if the Appellants had been pleased to do so I cannot think that income tax is due or not according to the manner in which the person making the profit pleases to deal with it

Counsel for the appellant contended that the bonds were intended to renew the promise to pay the amount due by the debtor through his agent and by the renewal of the promise even if the original liability was extinguished and a fresh liability was substituted no income was received by the appellant

We are unable to agree with that contention The Government of the State undertook to pay the amount of the bonds in satisfaction of the liability of the debtor The liability of the original debtor was extinguished and a fresh obligation was undertaken by the State Government in substitution of the original liability The Government had the right to recover the amount due under the bonds from the landholder but on that account the Government did not become the agent of the landholder for payment of his debts Even if the Government was unable to recover the money from the landholder the liability undertaken by the Government under the bond remained unimpaired The bond was a security for payment of the debt which completely replaced the original liability of the debtor

The decision in *Cross (H M Inspector of Taxes) v London and Provincial Trust Ltd* (1) on which counsel

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Shah J

for the appellant relied has, in our judgment no application to this case In 1932 the Brazilian Government suspended, payment of interest on Government bonds for a period of three years and issued interest bearing funding bonds in exchange for the interest coupons The London and Provincial Trust Ltd which held among its investments Brazilian bonds received funding bonds which it sold from time to time It was held that by issuing the funding bonds the Government of Brazil did not pay interest and the assessee Bank received no interest when it received the funding bonds Sir WILFRID GREENE, M R observed

> It is not open to question that income can be in the form of money s worth Nor is it open to question that if the holder of a security the contractual income from which is money receives from the person liable to pay that money something of money s worth (*e g , goods*) instead of the money such goods are income arising from the security * *
> On the other hand, where there is a mere substitution of a promise to pay at a later date for the obligation to make an interest payment presently due the owner of security cannot be said to have received income from it In such a case * *
> * the payment has been postponed instead of being made on its due date Nor do I see how it can make any difference if upon the true reading of the transaction the original obligation is extinguished and the promise to pay at a later date is accepted in its place

MACKINNON, L J observed at p 721

> It is quite true that income may arise by the receipt of money s worth as well as by the receipt of money And it is equally true that a debtor may pay his debt by giving the promise of a third party

to pay * * * But I am satisfied that there can never be payment of his debt by a debtor by giving his own promise to pay at a future date And I am equally satisfied that though income arises to a creditor from a debtor s paying his debt income does not arise by the debtor s promising that he will pay his debt later on

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Shah J

But the Encumbered Estates bonds were by operation of the statute received by the appellant in satisfaction *pro tanto* of the liability of the debtor They were a fresh security The liability of the original debtor was substituted by an obligation undertaken by the State the bonds were convertible in terms of money Income was therefore received by the appellant when the bonds were received

It is necessary to state that the income tax authorities have brought to tax the difference between the face value of the bonds and the principal which remained due in the relevant previous year But what was taxable was only that income which represented the difference between the amount due as principal and the market value of the bonds (which were payable in twenty instalments) at the date of receipt It is true that before the Income tax Appellate Tribunal this question was not expressly pressed The appellant did however contend that no part of the difference between the face value of the bonds and the principal amount due was taxable and the third question referred by the Tribunal was sufficiently comprehensive to justify consideration of the plea that a part of the difference only was taxable Having regard to the argument presented before the Tribunal and the amplitude of the question referred, the High Court was in error in refusing to consider whether only a part of the difference between the face value of the bonds and the principal amount

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RAJA MOHAN RAJA BAHADUR COMPANY v. COMMISSIONER OF INCOME TAX U P

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due to the appellant was taxable. Counsel appearing on behalf of the Department concedes that what was taxable was only the difference between the principal amount due and the market value of the bonds when received in the year of account and he has agreed that the necessary adjustments will be made by the Department in that behalf. In that view we do not think it necessary to modify the answer recorded by the High Court on the third question.

It is also necessary to observe that in the year 1949-50 the appellant had submitted a return disclosing the difference between the amount received by sale of the bonds and the principal amount due as income received in the previous relevant year. Whether that income was brought to tax pursuant to the return cannot be ascertained from the record. Counsel for the Department has stated that it is not the object of the Department to levy tax in respect of the same income twice. He has agreed that if tax has been levied in respect of the difference between the principal and the realized value of the bonds disclosed in the return for the assessment year 1949-50 appropriate adjustments will be made in that behalf. In view of the statements made at the Bar we do not think it necessary to give any directions in that behalf also.

The appeal is dismissed. There will be no order as to costs in this Court.

Appeal dismissed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Shah and the Hon'ble Mr Justice Ramaswami

INCOME TAX OFFICER, AGRA (APPELLANT)

v

RADHA KRISHAN (RESPONDENT)

1967

April 27

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Income Tax Act, (XI of) 1922 s 23(5)(a)—*Tax liability of partners of a registered firm—Tax assessed on or due from one partner—Whether recoverable from another partner*

The contractual obligations of a firm are no doubt enforceable jointly and severally against the partners but that principle or rule cannot be extended to their tax liability which is statutory and must be limited accordingly

Where assessment of a registered firm is made and the income of each partner is assessed under s 23(5)(a) of the Income Tax Act the tax assessed on or due from one partner cannot there being no provision in the Act to that effect be recovered from any other partner The provisions of s 44 of the Act and the cases thereon would be of no avail to assessments under s 23(5)(a)

Civil Appeal No 141 of 1966 from the Judgment and Order of the Allahabad High Court in Special Appeal No 205 of 1963 decided on 31st July, 1963

B Sen, (*S K Aiyar* and *R N Sachthey* with him) for the Appellant

A K Sen, (*J P Goyal* and *G C Sharma*, with him) for the Respondent

The following Judgment of the Court was delivered by—

SHAH, J —A business or manufacture and sale of tents was commenced in 1940 in the name and style of

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Messrs Jawahar Tent Factory Agra in partnership There were four partners in the firm—Jawahar Lal Shiam Lal, Radha Raman and Radha Krishan Jawahar Lal represented his Hindu undivided family and his share in the profit and loss was 0 8 0 (eight annas) in a rupee The share of other partners was 0 2 8 (two annas eight pies) each The firm was registered under s 26 A of the Indian Income Tax Act 1922 and tax was assessed on the income of the firm in accordance with s 23 (5) (a) of the Act The partnership was according to the Income tax Officer dissolved on 23rd October 1946

This appeal relates to the tax liability of Jawahar Lal in respect of the income from the firm for the assessment years 1944 45, 1945 46 1946 47 and 1947 48 The tax attributable to the share of Jawahar Lal, which it is claimed could not be recovered from him is sought to be recovered from his erstwhile partner Radha Krishan The following table sets out the share of the income of Jawahar Lal and the tax liability not satisfied by him in respect of the four years of assessment

Year of assessment	Share of income of Jawahar Lal from the firm	Tax liability not satisfied
	Rs	Rs
1944 45	17 717	8 032 56
1945 46	53 864	39 416 23
1946 47	31 661	16 92 59
1947 48	19 466	13 163 87
		79 29 25

The manner in which the tax liability is determined requires some elucidation The Hindu undivided family of Jawahar Lal had considerable other income In accordance with the provisions of s 25(3) (a) of the Indian Income Tax Act the share of Jawahar Lal from the income of the partnership was added to the other income of the family, and the family was assessed to tax

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on the total income For the purpose of computing the tax liability not satisfied as shown in the last column of the statement set out hereinbefore the Income tax Officer determined the average rate of tax on the total income of the Hindu undivided family and then applied that rate to the share of Jawahar Lal from the firm to determine the tax liability attributable to that share Tax collected from Jawahar Lal was credited proportionately to the income under the two heads towards the tax liability so determined and the tax liability of Jawahar Lal attributable to his share in the income was computed

The Income tax Officer served Radha Krishan respondent in this appeal—on 3rd October 1962 with demand notices for the tax remaining unpaid by Jawahar Lal Radha Krishan thereupon moved the High Court of Judicature at Allahabad for a writ of *certiorari* quashing the notices of demand and for an order directing the Income tax Officer to withdraw the notices MANCHANDA, J allowed the petition filed by Radha Krishan and the order passed by MANCHANDA, J was confirmed in appeal by a Division Bench of the High Court With special leave the Income tax Officer Agra has appealed to this Court

S 23(5) of the Income tax Act, as it stood at the material time read as follows

> (5) Notwithstanding anything contained in the foregoing sub sections when the assessee is a firm and the total income of the firm has been assessed under sub s (1), sub s (3) or sub s (4) as the case may be—
>
> (a) in the case of a registered firm the sum payable by the firm itself shall not be determined but the total income of each partner of

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the firm including therein his share of its income profits and gains of the previous year shall be assessed and the sum payable by him on the basis of such assessment shall be determined

Provided * * *

Provided further * * *

Provided also * * *

(b) in the case of an unregistered firm, the Income tax Officer may instead of determining the sum payable by the firm itself proceed in the manner laid down in clause (a) applicable to a registered firm if in his opinion, the aggregate amount of the tax including super tax if any payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually if the firm were assessed as an unregistered firm

The machinery for assessment to tax the income of a firm in the relevant years of assessment may be noticed A firm under the Income Tax Act is a unit of assessment, and the income of the firm is computed as that of the unit irrespective of whether the firm is registered or unregistered after the income of the firm is computed if the firm is registered under s 26 A the share of each partner in the income of the firm is determined and is added to his other income and the total income so computed is brought to tax If the firm is unregistered, the tax payable by the firm is except when the Income tax Officer otherwise directs in the interests of revenue, determined as in the case of any other entity and demand for tax is made on the firm itself The result is that if the firm is registered tax is collected from the partners individually and there is no levy of tax against

the firm If the firm is unregistered, the tax may, unless otherwise directed be levied against the firm In either case, the machinery set up by s 23(5) is for assessment of tax payable on the income of the firm The income of the firm is computed but tax is assessed on that income on the partners or the firm according as the income is of a firm registered or unregistered Counsel for the Income tax Officer contended that even though by s 23(5)(a) a provision was made for assessment to tax of the total income of each member of a registered firm by adding to his separate income the share of the profits of the firm, it is the firm which is assessed to tax, and if the tax attributable to the share in the income of the firm of a partner cannot be recovered from him it may be recovered from his other partners

Counsel for the Income tax Officer says that this is so because the liability of the partners of a firm in respect of all its obligations including the liability to pay tax is joint and several Undoubtedly contractual obligations of a firm are enforceable jointly and severally against the partners But the liability to pay income tax is statutory it does not arise out of any contract and its incidence must be determined by the statute If the statute which imposes liability has not made it enforceable jointly and severally against the partners, no such implication can arise merely because contractual liabilities of a firm may be jointly and severally enforced against the partners

Counsel also relied upon s 44 of the Income Tax Act which, as it stood at the relevant time read as follows

> Where any business profession or vocation carried on by a firm or association of persons has been discontinued or where an association of persons is dissolved every person who was at the time of such discontinuance or dissolution a partner of

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such firm or a member of such association shall in respect of the income profits and gains of the firm or association be jointly and severally liable to assessment under Chap IV and for the amount of tax payable and all the provisions of Chap IV shall so far as may be apply to any such assessment

S 44 is enacted with a view to prevent evasion of tax by discontinuance of the business of a firm or dissolution of an association of persons On discontinuance of the business of a firm or dissolution of the association of persons it is declared that every person who was at the time of such discontinuance or dissolution a partner of such firm or a member of such association shall in respect of the income profits and gains of the firm or association be jointly and severally liable to assessment and for the amount of tax payable

This Court has in *Commissioner of Income-tax Madras* v *S V Angidi Chettiar* (1) held that the provisions of s 44 of the Income-tax Act apply both to registered and unregistered firms But there is nothing in s 44 of the Act which supports the contention that for payment of tax assessed against a partner of a registered firm individually under s 23(5)(*a*) of the Act another partner becomes liable jointly and severally with that first partner to pay tax The entire scheme of taxing the income of a registered firm in the hands of individual partners is inconsistent with any assumption that for payment of tax assessed against a partner other partners are liable The tax assessed against a partner of a registered firm is assessed on his total income inclusive of the share in the firm's income and the rate applicable is determined by the quantum of the total income of the partner S 44 contemplates cases of joint

(1) 41 I T R 795

and several assessment of income of the business of a firm which is discontinued When such an assessment is made each member of the firm may be liable to pay jointly and severally tax payable by the firm But when under the scheme of the Act tax is assessed individually against each partner, and no tax is made payable by the firm, the principle of joint and several liability under s 44 has no application

Counsel for the Commissioner said that this Court had, if not expressly tacitly, accepted the view that the liability of the partners of a firm to pay tax attributable to the share of each partner in the income of the firm is joint and several Counsel relied upon the clause determining the tax payable by registered and unregistered firms respectively in the judgment of this Court in *Commissioner of Income tax, Bombay* v *Amritlal Bhogilal & Company* (1) at p 136

> 'It is true that the Income tax Officer is empowered to follow the two methods specified in s 23(5)(*a*) and (*b*) *in determining the tax payable by registered and unregistered firms respectively* and making the demand for the tax so found due, but this does not affect the computation of taxable income',

and contended that the tax determined to be payable under s 23(5) is payable by the firm, and hence by all the partners jointly and severally But in *Amritlal Bhogilal's* case (1) the Court was called upon to determine whether the Commissioner of Income tax in exercise of his revisional power may cancel registration of the firm granted under s 26 A and direct the Income tax Officer to make fresh assessment of the firm as an unregistered firm, when an appeal is pending against the order of assessment before the Appellate Assistant

(1) 34 I T R 130

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Commissioner In making the observations relied up on the Court broadly examined the scheme of assess ment of registered firm it was not stated by the court expressly, nor can it be implied, that for tax attributable to the share of a partner in a registered firm, the other partners are liable, notwithstanding separate assessment under s 23(5)(*a*)

Reliance was then placed upon the following observa tions made by this Court in *S V Angidi Chettiar's* case (1) at p 744

> 'Under s 23(5) of the Indian Income Tax Act, before it was amended in 1956, in the case of a registered firm the tax payable by the firm itself was not required to be determined but the total income of each partner of the firm including there in the share of its income, profits and gains of the previous year was required to be assessed and the sum payable by him on the basis of such assessment was to be determined But this was merely a method of *collection of tax due from the firm*"

In *S V Angidi Chettiar's* case (1) it was held that the Income tax Officer has power to make an order under s 28 imposing penalty on a firm even after dissolution of the firm There is nothing in the observations relied upon which indicates that under s 23(5)(*a*) when the income of a registered firm is computed, and the tax liability is imposed by the machinery provided there under, the tax is imposed upon the firm or is recover able jointly and severally from the partners of the firm

A recent case was also relied upon, *Shivram Poddar v Income tax Officer, Central Circle II, Calcutta* (2) In that case it was held that the firm, by the discontinu ance of its business, does not cease to be liable to pay

(1) 44 I T R 739 (2) 51 I T R 828

tax on the income earned by it, nor can a procedure different from the, one prescribed under Ch IV of the Income Tax Act, 1922, apply for assessment of the in come of such a firm The firm, after it has discontinued its business, whether it is dissolved or not, will be assessed either under s 25(1) in the year of account in which it discontinues its business, or in the year of assessment In both cases the procedure for assessment is under s 23(3) and (4) supplemented by s 23(5) The principle of that judgment also has no application to the present case Reliance was placed upon the observation made at p 828

> "On the discontinuance of the business of a firm, however, by s 44 a joint and several liability of all partners arises to pay tax due by the firm"

But that obviously means that a joint and several liability arises when the income of a firm which has discontinued its business is assessed under s 44 It does not mean that where the assessment is made under s 23(5)(*a*) of a registered firm and the income of each individual partner is assessed, the partners become jointly and severally liable to pay the aggregate amount of tax attributable to their various shares in their individual assessments

The cases relied upon by counsel for the Income tax Officer do not support the claim made by the Income tax Officer

The appeal fails and is dismissed with costs

Appeal dismissed

SUPREME COURT

APPELLATE CIVIL

1967
May 4

Before the Hon'ble Mr Justice Bachawat, the Hon'ble Mr Justice Shelat and the Hon'ble Mr Justice Bhargava

VISHNU PRATAP SUGAR WORKS (P) LTD
(APPELLANT)

v

CHIEF INSPECTOR OF STAMPS, U P
(RESPONDENT)

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Court Fees Act, *(VII of* 1870) *as amended in its application to U P Subss (iv)(a) (iv A) and (iv B)(b) of s 7—Suit for injunction based on alleged invalidity of Acts imposing cess and purchase tax on sugarcane—Court fee payable on*

In a suit for injunction restraining the Government from realising sugarcane cess and purchase tax on the alleged invalidity of the Acts imposing them it could not be said that those Acts were instruments within the meaning and for the purposes of court fee under s 7(iv A) of the Court Fees Act It could not be placed under s (iv)(*a*) either because it was not a suit for declaration with the consequential relief of injunction The suit would come within and be liable to payment of court fee under s 7(iv B)(*b*) of the Act

Civil Appeal No 1668 of 1966 from the Judgment and Order dated the 2nd November, 1965 of the A lah abad High Court in Civil Revision No 1095 of 1965

G N Dixit, for the Appellant

Bishan Narain (*O P Rana*, with him), for the Res pondent

The following Judgment of the Court was delivered by—

SHELAT, J —The appellant company filed suit no 16 of 1963 against the State of Uttar Pradesh and the Union

of India, *inter alia*, praying for a permanent injunction restraining the State of Uttar Pradesh, its servants and agents from realising or from proceeding to realise sugar cane cess and purchase tax amounting to Rs 33 lakhs and odd charged under the U P Sugar Cane (Regulation of Supply and Purchase) Act, 1953, the Sugar Cane Cess Act, 1956 read with the U P Sugar Cane Cess (Validation) Act, 1961 and the U P Sugar Cane Purchase Tax Act IX of 1961 In the said suit, the appellant company, *inter alia*, alleged that the Acts for the diverse reasons set out therein were invalid and void and therefore the State was not entitled to levy, collect or recover the said cess or the purchase tax and prayed, as aforesaid, that the State should be restrained from proceeding to realise the said cess or tax The appellant company paid court fees on its said plaint under sub s (iv B) (*b*) of s 7 on the footing that the relief sought in the suit was an injunction The Chief Inspector of Stamps objected to the court fees being paid under cl (*b*) of sub-s (iv B) of s 7 contending that the court fees payable were as provided under sub s (iv)(*a*) of s 7 or under sub s (iv-A) of s 7, that is to say, on the footing that the suit was for a declaratory decree where consequential relief prayed for was an injunction or on the footing that the suit involved cancellation of or of adjudging void an instrument securing money or other property having such value The trial Judge rejected the objections and held that the court fees payable were adequate as cl (*b*) of sub s (iv B) of s 7 applied The Chief Inspector of Stamps thereupon filed a revision application before the High Court reiterating the said objections The High Court rejected the contention that s 7(iv)(*a*) applied but held that sub-s (iv A) of s 7 applied as the said Acts were instruments securing money within the meaning of that sub section and that though the relief claimed in the suit was injunction in substance and

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VISHNU PRATAP SUGAR WORKS (P) LTD. v. CENTRAL INSPECTOR OF STAMPS U. P.

Shah J.

effect the suit involved adjudgment of the said Acts as void. Hence this appeal by special leave.

Sub-s. (iv A) of s. 7 reads as follows:

> For cancellation or adjudging void instruments and decree—In suits for or involving cancellation of or adjudging void or voidable an instrument securing money or other property having such value

The question which falls for determination is whether an Act passed by the Central or the State Legislature can be said to be an instrument and, if so, an instrument securing money or other property having such value. The Court-fees Act does not define the word instrument. That being so we have to turn for the connotation of the word instrument to its ordinary dictionary meaning. According to Stroud's Judicial Dictionary, 3rd Ed., Vol. II, p. 1472, 'instrument' means a writing, and generally imports a document of a formal legal kind. Semble, the word may include an Act of Parliament (see Deed of Settlement) so, in the Trustee Act, 1925 (15 Geo. 5 c. 18) s. 68 (11) Conveyancing Act, 1881 (44 & 45 Vict. c. 41) s. 2 (xiii), 'instrument' includes deed, will, inclosure award, and Act of Parliament. Thus an instrument may include a statute enacted by Parliament if the particular statute in its context includes it as an instrument. According to Jowitt's Dictionary of English Law, p. 984 " 'instrument' means a formal legal writing, e.g., a record, charter, deed of transfer or agreement.' It is, however, observed that under the Law of Property Act, 1925, s. 205(1)(viii), 'instrument' for the purpose of this Act does not include a statute unless the statute creates a settlement. An instrument is a writing and generally means a writing of a formal nature. But where there is a power to appoint by any deed or instrument or by will, any

writing, such as a letter, which refers to the power, or which can have effect only by operating on the fund (such as a cheque or other order for payment), is an instrument A telegram is an instrument within the meaning of the Forgery Act, 1912 s 7, and so is an envelope with a postmark falsified for the purposes of a betting fraud' According to the same dictionary, the word 'enact means to act, perform or effect, to establish by law, to decree and an 'enactment means an Act of Parliament or statute or any part thereof A statute, according to Maxwell on Interpretation of Statutes, 11th Ed p 1 is the will of the legislature, i e an edict of the legislature A statute is, however, different from a statutory instrument as defined by the Statutory Instruments Act (9 & 10 Geo 6, c 36) 1946 where power to make confirm, or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown a document by which that power is exercised is a statutory instrument Similarly, where by an Act passed before the enactment of the Statutory Instruments Act 1946 power to make statutory rules is conferred on any rule making authority any document by which that power is exercised is a statutory instrument Thus whereas a statute is an edict of the legislature, a statutory instrument as distinguished from such an edict is a document whereby the rule making power is expressed In *Mohan Chowdhury* v *The Chief Commissioner Tripura* (1) the question arose whether the order dated 3rd November 1962, passed by the President under Art 359(1) of the Constitution suspending the right of any person to move any court for the enforcement of rights conferred by Arts 21 and 22 during the Proclamation of Emergency was an instrument within the meaning of s 8(1)

(1) (1964) 7 S.C.R. 648.

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of the General Clauses Act, 1897 In considering that question this Court approved the meaning of the word instrument given by Stroud and observed

> The expression is also used to signify a deed *inter partes* or a charter or a record or other writing of a formal nature But in the context of the General Clauses Act, it has to be understood as including reference to a formal legal writing like an Order made under a statute or subordinate legislation or any document of a formal character made under constitutional or statutory authority We have no doubt in our mind for the expression instrument in s 8 was meant to include reference to the Order made by the President in exercise of his constitutional powers '

The President s Order having been made under power conferred upon him by Art 359 that Order would have the same connotation as the Statutory instrument de fined by the Statutory Instruments Act, 1946 and there fore was an instrument within the meaning of s 8(1) of the General Clauses Act That does not mean that a statute like the U P Court Fees Act which is an edict of the legislature is an instrument In *Emperor* v *Ravan gouda Lingangouda Patil* (1), the High Court of Bom bay considered whether an order of the Government delegating its power to District Magistrates under the Defence of India Rules was an instrument within the meaning of s 8(1) of the General Clauses Act The High Court held that an instrument, generally speak ing means a writing usually importing a document of a formal legal kind, but it does not include Acts of Parliament unless there is a statutory definition to that effect in any Act There is thus ample authority to hold that ordinarily a statute is not an instrument unless

(1) A I R 1944 Bom 289

as in the case of Conveyancing Act of 1881, the definition includes it or as in the case of s 205(1)(viii) of the Law of Property Act, 1925, the statute creates a settlement and such statute is for that reason treated as an instrument It would not therefore be correct to say that the Acts alleged in the plaint to be void are instruments within the meaning of sub s (iv A) of s 7 In this view, it does not become necessary to decide whether the Acts are instruments securing money or other property having such value Sub s (iv A) of s 7 would not, therefore, apply and the High Court was not right in calling upon the appellant company to pay additional court fees under that sub-section

Mr *Bishan Narain*, however, argued that even if these Acts are not instruments, the plaint if read in substance rather than in form is for a declaratory decree with injunction as the consequential relief and therefore sub s (iv)(*a*) of s 7 would apply and the court fees paid merely on the footing of the suit being for an injunction would not be adequate As stated earlier, the High Court rejected this contention as untenable Mr *Bishan Narain*, contended that he was nonetheless entitled to argue that the High Court was in error and that sub s (iv)(*a*) would apply and not cl (*b*) of sub s (iv B) For this purpose he relied on some observations in *Ramanbhai Ashabhai Patel* v *Dabhi Ajitkumar Fulsinji* (1) where it has been held that as soon as special leave is granted this Court has the power to decide all the points arising from the judgment appealed against and even in the absence of an express provision like O XLI, r 22 of the Code of Civil Procedure it can devise appropriate procedure to be adopted at the hearing Assuming that Mr *Bishan Narain* can urge the contention that s 7(iv)(*a*) applies in the present case the contention still fails It is true that for purposes of the Court fees Act, it is the substance and not the

(1) (1966) 1 S C R 712

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form which has to be considered while deciding which particular provision of the Act applies It cannot, however, be gainsaid that the actual relief prayed for in the plaint was an injunction restraining the State and its authorities to realise from the appellant company the aforesaid cess and the purchase tax It is clear from the plaint when read as a whole that though the appellant company alleged that the Acts were void and therefore *non est* for the reasons set out therein, it did not seek any declaration that they were void The plaint proceeds on the footing that the said Acts were void and that therefore the State of U P or its authorities had no power to realise the said tax and the said cess It may be that while deciding whether to grant the injunction or not, the court might have to consider the question as to the validity or otherwise of the said Acts But that must happen in almost every case where an injunction is prayed for If for the mere reason that the court might have to go into such a question a prayer for injunction were to be treated as one for a declaratory decree of which the consequential relief is injunction all suits where injunction is prayed for would have to be treated as falling under cl (*a*) of sub s (iv) of s 7 and in that view cl (*b*) of sub s (iv B) of s 7 would be superfluous The contention urged by Mr *Bishan Narain* therefore cannot be accepted

For the reason aforesaid, we are of the view that neither cl (*a*) of sub s (iv A) of s 7 nor sub-s (iv A) of s 7 would apply and the court fees payable on the plaint were under cl (*b*) of sub s (iv B) of s 7 The appeal therefore, has to be allowed The order of the High Court is set aside and the order of the trial court is restored The respondent will pay the appellant company the costs of this appeal

Appeal allowed,

CIVIL MISCELLANEOUS—(FULL BENCH)

Before Mr Justice B Dayal, Mr Justice Asthana and Mr Justice M H Beg

SITA AND OTHERS (PETITIONERS)

1967

August 2

v

STATE OF U P AND OTHERS (OPPOSITE PARTIES)

U P Consolidation of Holdings Act, 1953 *ss* 12 *and* 21 *and U P Consolidation of Holdings Rules, r* 34—*Proceedings under s* 12 *of the Act—Nature of—Cannot be regarded as summary or mutation proceedings*

There is no warrant for the proposition that the legislature considered the proceedings under s 21 of the Act as determinative of the question of title or of questions involving rights to Sirdari Adhivasi and Asami rights hence it provided for an appeal while proceedings under s 12 of the Act were regarded merely as summary proceedings in the nature of mere mutation proceedings under the Land Revenue Act inasmuch as r 34 from the very inception of the Act provided for an appeal from the order of the Consolidation Officer

U P Consolidation of Holdings Act 1953 ss 23 20 *and* 12—*Objections which could be filed under s* 12 *cannot be filed under s* 20

Any argument based on the effect of s 23 does not establish that s 20 permits filing of objections of similar nature which could be filed under s 12 of the Act

U P Consolidation of Holdings Act 1953 ss. 23(2) *and* 38(2)—*Confirmation of statement of proposals under s* 23(2)—*Correction of clerical error can be done at any time under s* 38(2) *before denotification*

In any case it is always open under sub-s (2) of s 38 of the Act to the Consolidation Officer or Settlement Officer (Consolidation) to correct a clerical error apparent on the face of the record in any document prepared under any provision of the Act This can be done even though the statement of proposals achieves confirmation under s 23(2) of the Act The power under sub-s (2) of s 38 can be exercised at any time before the notification under s 52 is issued.

Per Majority (BEG J *dissenting*)

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SITA
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STATE OF UTTAR PRADESH

Ganga Singh v *Deputy Director of Consolidation U P* (1) over ruled.

Civil Miscellaneous Writ No 3279 of 1961

Sripat Narain Singh, for the Petitioners

S C, for the Respondents

The judgment of the court was delivered by—

ASTHANA, J —This case has been referred to a Full Bench for resolving the apparent conflict between the two Division Bench decisions of this court, namely, *Ganga Singh* v *Deputy Director of Consolidation, U P, Lucknow* (1) and *Roop Narain* v *State* (2) There is yet another Division Bench decision in the case of *Ram Bharosey Lal* v *Deputy Director of Consolidation, U P* (3) which also requires to be reconciled with the aforementioned decision

The petition under Art 226 of the Constitution which has given rise to the above reference was filed by Sita Naumi and Kumar as petitioners against the State of Uttar Pradesh the Deputy Director of Consolidation the Settlement Officer (Consolidation), the Consolidation Officer and one Surajbhan Rai The validity of the orders passed by the abovementioned Consolidation authorities in the proceedings arising out of an objection filed by the petitioners under s 20 of the U P Consolidation of Holdings Act as unamended before 1958 (hereinafter called the Act) were questioned in the petition and a writ in the nature of *certiorari* was sought for quashing of the orders of the said Consolidation authorities and for other necessary directions By the impugned orders the claim of the petitioners to be recorded as Sirdar of two plots nos 1011 and 1119 stood rejected and the name of Surajbhan Rai was recorded as Bhumidhar of the said plots The Consolidation proceedings commenced in the village in which

(1) 1965 R D 13 (2) 1962 A L J 886
(3) 1964 R D 411

the plots in dispute were situate in the year 1955 In the statement of tenure holders published under s 11 of the Act in C H Form No 20 the name of the petitioners was shown as Sirdar of plot no 1191 but their name did not appear and Surajbhan Rai s name appeared as against plot no 1011 The petitioner thereupon filed an objection under s 12 of the Act claiming to be Sirdars of plot no 1011 and prayed for recording of their names after expunging the name of Surajbhan Rai who was shown as the Bhumidhar of that plot In his turn Surajbhan Rai filed an objection under s 12 of the Act in respect of plot no 1119 and prayed that his name be entered as Bhumidhar against that plot after expunging the names of the petitioners The Consolidation Officer consolidated the two objections and heard them together By his order dated 13th February 1960, the Consolidation Officer rejected the objection of the petitioners and allowed the objection of Surajbhan Rai with the result that the entries were directed to be corrected by entering the name of Surajbhan Rai as Bhumidhar of both the disputed plots The petitioners thereupon filed two appeals both of which were dismissed by one judgment by the Settlement Officer on November 29, 1960 The petitioner then went up in revision under s 48 of the Act against the order of dismissal of the appeals While this revision was pending before the Deputy Director the statement of proposals under s 19 of the Act was published and CH Form 24 was distributed showing the name of Surjbhan Rai as the Bhumidhar of the two disputed plots The petitioners thereupon filed an objection under s 20 of the Act claiming to be the Sirdar of the said plots and prayed for the correction of the entries in CH Form 24 by entering their names as Sirdars after expunging the wrong entry in favour of Surajbhan Rai The Consolidation Officer by his order dated

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24th February, 1961 rejected the objection of the petitioner filed under s 20 of the Act The Consolidation Officer did not think it proper to record any findings and pass any order on merits as he took the view that the petitioners had already lost their case in the proceedings arising out of objections filed under s 12 of the Act An appeal by the petitioners from this order of the Consolidation Officer was dismissed by the Settlement Officer by his order, dated 18th March, 1961 on the view that the same dispute between the parties stood decided in the proceedings under s 12 of the Act The petitioners then went up in revision against the appellate order dated 18th March 1961 The Deputy Director decided this revision along with the earlier revision arising out of proceedings under s 12 of the Act which was pending and dismissed both the revisions by his order, dated 8th August, 1961 holding that there did not appear to be any substantial irregularity or illegality in the orders passed by the subordinate authorities

When the petition was heard by one of us sitting singly it was urged on behalf of the petitioners that the proceedings arising out of objections filed under s 12 of the Act not having become final as the revision was pending before the Deputy Director when the statement of proposals were published under s 19 of the Act and CH Form 24 distributed the petitioners were within their right to file objections under s 20 of the Act for correction of the entries in respect of the two disputed plots and the Consolidation authorities in rejecting the objection of the petitioner on the ground that it was incompetent manifestly erred in exercise of their jurisdiction Reliance was placed by the learned counsel for the petitioners on the case of *Ganga Singh* v *Deputy Director of Consolidation* (1) in which it was

(1) 1965 R D 82

held that there was no provision in the U P Consolidation of Holdings Act barring the filing of objection under s 20 simply on the ground that an objection had already been filed under s 12 and heard It was submitted since the decision given by the Consolidation Officer under s 12 had not attained finality because of the pendency of the revision, the objection under s 20 of the Act would be competently decided by the appropriate authorities On behalf of the contesting opposite party, Surajbhan Rai, reliance was placed on the case of *Roop Narain* v *State* (1) in which it was held that objections which could be raised at the stage of s 12 before the Consolidation Officer were not contemplated to be raised under s 20 of the Act

Sri Sripat Narain Singh, learned counsel for the petitioners contended that under s 20 of the Act any person affected by the proposals is entitled to file an objection in writing and since under s 19(1) *(a)* the particulars specified in cl *(b)* of sub-s (1) of s 11 in respect of each tenure-holder are required to be shown and since the proposal published did not contain the correct particulars about the two plots in dispute and wrongly showed the name of Surajbhan Rai as the Bhumidhar and not the name of the petitioners as Sirdar which would have been correct, the petitioners were directly affected by the said proposals so published and their objection ought to have been considered by the consolidation authorities It was submitted if the same mistake in respect of the particulars of the tenure holder which occurred in the statement published under s 11 continue in the statement of proposals published under s 19 it becomes the duty of the consolidation authorities to correct the mistake on objections being filed when no final decision had been taken by the con

(1) 1962 A L J 888

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solidation authorities in respect of the objections of the same nature filed under s 12 of the Act Learned counsel relied upon sub s (2) of s 22 of the Act and pointed out that upon the publication of the statement of proposals all proceedings pending before the Consolidation authorities whether in the first instance in appeal in reference or revision in which question of Bhumidhari Sirdari Adhivasi or Asami right is involved in relation to the land which is included in the statement of proposal, shall be stayed and submitted that that clearly indicated that the previous proceedings under s 12 of the Act involving questions of Bhumidhari or Sirdari rights would no longer be adjudicated as similar questions could competently be raised in objections under s 20 of the Act for adjudication This argument of the learned counsel implies that the word court' in sub s (2) of s 22 includes Consolidation Officer Settlement Officer (Consolidation) and Deputy Director or Director of Consolidation In the case of *Ram Bharosey Lal* v *Deputy Director of Consolidation* (1) a Division Bench has held that the word 'court in sub s (2) of s 22 did not include the aforementioned authorities Learned counsel tried to persuade us that *Ram Bharosey Lal's* case (1) has been wrongly decided and needed reconsideration All the arguments which were considered by the Bench in the case of *Ram Bharosey Lal* (1) were reiterated before us The learned counsel did not advance any new argument Having given careful consideration to the submissions made before us we think no such compelling circumstance has been pointed out which will throw any doubt on the correctness of the decision in *Ram Bharosey Lal* s case (1) We do not agree therefore with the learned counsel for the petitioner that the provisions of the Act contemplated an end to the proceedings under s 12 of

(1) 1966 R D 411.

the Act whether before the Consolidation Officer pending in appeal or revision in which the question of Bhumidhari, Sirdari right are involved in respect of land under consolidation and the intendment of the Act was that the same objection could again be raised under s 20 of the Act.

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There is yet another difficulty in accepting this line of argument If what Sri *S N Singh* argues were to be accepted then an intention to the Legislature must be attributed that the same kind of proceedings before the same class of officers will have to be undergone once over again The same evidence will again have to be assessed and the same issues will have again to be determined by the original authority or by the appellate authority, or by the revisional authority as the case may be Unless the language of the statute is expressly clear and definite it is difficult to accept that the law contemplated a repetition of the same proceedings It was tried to be suggested on behalf of the petitioners that there will be no practical difficulty inasmuch as it will always be open to the authorities to apply the doctrine of *res judicata* and decide the objection in terms of the previous decision This argument is fallacious Firstly, the doctrine of *res judicata* pertains to the jurisdiction of a court and what has been decided between the parties in an earlier litigation is barred from being raised in a subsequent litigation That is to say a court cannot allow a question to be raised which has already been adjudicated upon between the parties in an earlier case In other words law makes it incompetent for any court to entertain such a question If the subsequent objection filed under s 20 of the Act raises the same questions which had already been adjudicated upon in the earlier proceedings under s 12 of the Act then the doctrine of *res judicata* itself would render any objection filed under s 20 of the Act

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raising similar questions as incompetent Secondly, if the proceedings in the first stage are still pending and have not been finally decided then the question of *res judicata* will not arise In this connection the learned counsel referred to sub s (7) of s 12 of the Act and submitted that only a question of title in respect of any plot which might and ought to have been raised but had not been raised shall not be allowed to be raised in any objection filed under sub s (2) of s 20 of the Act, therefore, questions involving Sirdari rights whether raised or not raised under s 12 and question involving Bhumidhari rights which had been raised under s 12 can always be raised under s 20 What the learned counsel submitted was that even the doctrine of *res judicata* has a very limited application under the scheme of the Consolidation of Holdings Act and sub s (7) of s 12 confines its applicability to a question of Bhumidhari which might and ought to have been raised under s 12 of the Act but was not raised We do not think that this argument in any way, even if tenable, improves the case of the petitioners We think the learned judges who decided the case of *Roop Narain* v *State of U P* (1) rightly observed that sub s (7) of s 12 only re stated the rule of constructive *res judicata* as contained in the Civil Procedure Code We do not think the learned counsel for the petition ers can build any argument on its basis to establish that under the scheme of the Act same questions can be raised by a tenure holder under s 20 of the Act in respect of land which can be raised under s 12 of the Act in respect of the same land

It was then contended that s 12 is placed in Chap 2 of the Act which deals with the Revision and Correc tion of Maps and Records, therefore, s 12 related to

(1) 1969 A L J 888

the correction of the records only and under the scheme of the Act the real questions of title or questions relating to Sirdari Adhivasi and Assami rights were left to be determined under s 21 of the Act A reference was made to sub s (1) of s 22 and it was pointed out that a question of title in or over land is to be determined by raising objection under s 20 of the Act and the consolidation authorities are bound to entertain such objections and under a duty to determine the same We think the questions of title as emphasised in sub s (1) of s 22 can arise on account of some thing done in laying down the principles of consolidation and in framing the proposals under Chap 3 of the Act It does not envisage a question of title which could be competently raised under s 12 of the Act We do not agree that merely because s 12 has been placed in Chap 2 whose heading is The Revision and Correction of Maps and Records" that any decision arrived in those proceedings is to be regarded as of a summary nature and the same question was permitted to be determined in a more elaborate manner under s 21 of the Act If that were the intention of the Legislature then under s 12 of the Act provision for arbitration through a civil court would not have been made It was submitted that there is no provision in the Act for appeals from a decision of the Consolidation Officer in the proceedings under s 12 of the Act but there is a provision for appeal from a decision in proceedings under s 21 of the Act which shows that the Legislature considered the later proceedings as determinative of the question of title or of questions involving rights to Sirdari Adhivasi and Asami rights hence it provided for an appeal while a proceeding under s 12 of the Act were regarded merely as summary proceedings in the nature of mere mutation proceedings under the Land Revenue Act We think there is no warrant for such a propo-

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sition R 54 of the rules framed under s 54 of the Act from the very inception of the Act provided for an appeal from the order of the Consolidation Officer in the proceedings under s 12 of the Act The rules framed are as much part of the Act as any other provision enacted by the Legislature itself R 54(3) has been held to be valid by this Court Thus this argument has no tenability

It was next emphasised by Sri *S N Singh* that there is nothing in ss 20 and 21 of the Act and for the matter of that in any other provision of the Act or the rules which bar an objection of the same nature which could be raised under s 12 of the Act and submitted that the case of *Ganga Singh* (1) was correctly decided A reference was made to a decision of a learned Single Judge in the case of *Sheoraj Singh* v *Deputy Director of Consolidation* (2) in which a view has been expressed to the effect that where a person after having filed an objection under s 12 of the Act neglects to file an objection at the stage of s 20 or the allotment of chaks he will lose all advantage that might secure to him by any proceeding or continuation of any proceeding under ss 9 to 12 of the Act it would be seen that the decision in *Sheoraj Singh's* case (2) was based on the Division Bench ruling in *Ganga Singh's* case (1) The learned Single Judge in *Sheoraj Singh's* case (2) did not notice the Division Bench ruling in the case of *Roop Narain* v *State* (3) Another case which was referred by Sri *S N Singh* is a decision by the same learned Judge who decided the case of *Sheoraj Singh* (1) That case is *Bansidhar* v *Deputy Director of Consolidation* (4) In *Bansidhar's* case (4) the learned Judge expressed the opinion that there being no provision in the Act that orders passed in objection

(1) 1967 R D 12 (2) 1967 R D 1
(3) 1962 A L J 688 (4) 1967 R D 51

under s 9 of the Act (equivalent to s 12 of the old Act) if the objections are decided after the stage of objections under s 20 of the Act shall be given effect to it therefore followed that if any objection under s 9 of the Consolidation of Holdings Act was pend ing either before the Assistant Consolidation Officer or before any superior officer that will not affect the petitioner's liability to file an objection under s 20 of the Act, *Ganga Singh's* case (1) was again relied upon in *Banshidhar's* case (2) On the basis of the *ratio decidendi* of these cases it was submitted that once the provisional consolidation scheme is confirmed under s 23(2) of the Act the proceedings under s 12 of the Act still pending would become infructuous We fail to appreciate how the reasoning that once the provision al consolidation scheme is confirmed under s 23 of the Act the proceeding under s 12 pending on that date will be rendered infructuous helps the petitioner in estab lishing that the same objections which could be rais ed under s 12 of the Act can be raised under s 20 of the Act A proceeding pending before the Consoli dation Officer under s 21 of the Act or a decision given by a Consolidation Officer in that proceeding pending in appeal or revision on the date when the provisional consolidation scheme is confirmed under s 23(2) of the Act would equally be affected and would be rendered infructuous It was urged that the pro visional consolidation scheme cannot be confirmed under s 23(2) of the Act unless all the objections filed under s 20 of the Act have attained finality and sub s (1) of s 23 was referred in this connection which pro vides that the Settlement Officer (Consolidation) shall confirm the statement of proposals if no objections were filed within the time specified in s 20 or where such

(1) 1965 R D 12 (2) 1967 R D 51

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objections are filed, after such modification or alterations, as may be necessary, in view of the orders passed under s 21 The only exception which has been made by sub s (2) of s 23 is in regard to the reference made to the Civil Judge and which had not been disposed of till then It will be seen that s 21 of the Act invisages proceedings up to the stage of an appeal and does not cover revisions filed under s 48 of the Act Thus, in any view of the matter if a revision were pending in a proceedings arising out of objections under s 20 of the Act that may not stand in the way of the Settlement Officer (Consolidation) confirming the statement of proposals under s 23(1) of the Act [*See Raghunandan v Regional Deputy Director of Consolidation* (1) It is therefore, not correct to say that unless all decisions on objections filed under s 20 of the Act attain finality the statement of proposals cannot be confirmed as in the exercise of revisional jurisdiction under s 48 of the Act the appellate decision can be varied, modified or set aside Any argument based on the effect of s 23, therefore does not necessarily establish that s 20 permits filing of objections of similar nature which could be filed under s 12 of the Act

Sri *S N Singh* then emphasised that to avoid the inconvenience which would otherwise be caused by long delay if the Consolidation Authorities were to wait till the time when all the decisions on objections under s 12 of the Act attain finality, before they enter upon further stages of consolidation, the legislature by enacting s 20 and permitting objections against the proposals by affected persons clearly intended that similar objections could be filed again which were filed under s 12 of the Act when the decisions thereon did not attain finality, the proceedings still remaining pending either

(1) 1966 A L J 387

in appeal or revision In our judgment there is no substance in this submission of the learned counsel How the delay would be avoided by permitting objections of the same nature repeatedly at different stages of consolidation is not easy to understand In fact repeated objections of similar nature at different stages would result in further prolonging the proceedings and will cause more delay Consolidation is a complicated and protracted operation The Legislature could not have intended that a tenure holder should have an unlimited right to have his same rights or interests examined and re examined at different stages It is not possible to attribute an intention to the Legislature that it expected a tenure holder to incur expenses repeatedly for vindication of the same right before the same authorities on the same evidence in support of his claim over and over again Such a procedure would not only be onerous and burdensome to the tenure holder but would result in waste of public time and unnecessarily occupying the time of the officers responsible for consolidation

On an examination of the material provisions of the Act it would be found that the process of consolidation of holdings has been divided into various stages The tenures could not be consolidated unless it were determined who were the tenure holders of particular tenures The first stage envisaged under scheme of the Act is a revision and correction of the village records This is accomplished either by wholesale revision of maps or records of the village or by directing the Assistant Consolidation Officer to proceed with the correction of maps or records who after Partal corrects the entries in the annual register At this stage any person aggrieved may appeal to the Consolidation Officer whose decision will be final except as otherwise provided by or under the Act

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(1) 1966 A L J 387

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After the entries have been so corrected then they are duly recorded. The next stage is the publication of statement of plots and tenure holders on the basis of the records. Any person interested in disputing the correctness or nature of an entry in the statement of tenure holders or pointing out any omission therefrom is entitled to file an objection. When objections have been disposed of and the statement of tenure holders is corrected then the next stage of preparation of statement of principles is reached. The statement of principles is then prepared on the basis of the statement of plots and tenure holders. Any person aggrieved by any mistake in the statement of principles has a right to have it corrected by filing objections. After the corrections if any have been made then a further stage is reached of re-adjustment of plots according to the principles. A statement of proposals is then drawn up which would be based on all what had preceded. Any person affected by any thing in the statement of proposals that is by re-allocation of plots according to the principles, may file objections. After the objections have been disposed of and the statement of proposals corrected and modified then they are confirmed and made final. The next stage is the transfer of possession of the allotted chaks in accordance with the confirmed statement of proposals. The last stage is the preparation of the village records and maps in accordance with the confirmed proposals. The Consolidation proceedings finally close by issue of a notification just as they commence by issue of a notification. It would be seen that it is a well knit scheme and the operations at each subsequent stage depend upon the result of the operation carried on at the preceding stage which must become final before the next stage of operation is taken up. The scheme under the Act will be difficult of accomplishment and fulfilment if at

each stage the tenure holder or any person affected was permitted to rake up controversies which could be settled or had been settled at the earlier stage That is why it would be found that there are provisions in the Act laying down that what is done at various stages becomes final, except as otherwise provided by or under the Act

When the scheme under s 12 of the Act is examin ed in the light of the overall scheme of Consolidation operations as envisaged by the Act, it is not possible to contemplate that a dispute relating to the correct ness or nature of an entry in the village records or supplying of any omission therein survives at the sub sequent stages of the consolidation operation and can be raked up again S 12 is a self—contained and com plete provision for determining a dispute relating to the correctness or nature of an entry or of any omis sion therefrom The entries in the village records serve as the very foundation of consolidation S 12 contains a machinery for correcting the records after giving opportunity to the persons interested and hear ing them in support of their claims so that when the next stage in consolidation operations commences the entries in the village records are no longer open to challenge and the statement of principles and the state ment of proposals can be based thereon It is to be noted that in the statement of proposals as required by s 19 of the Act the particulars specified in cl (*b*) of sub-s (1) of s 11 in respect of each tenure holder have to be shown It is presumed that it is the correct particulars in respect of each tenure holder which would be entered in the statement A person who claims to be tenure-holder but whose name is not shown in the statement of tenure holders as published under s 11 of the Act must get the statement corrected

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and the only provision under the Act for the purpose is s 12 If he files an objection under s 12 and succeeds then the statement of tenure holders would be corrected accordingly If he does not file any objection then the statement of tenure holders will not require any correction When the stage comes for preparation of the statement of proposals then the particulars in respect of each tenure holders to be shown in the statement of proposals would be based on the entries in the village records as they emerge after corrections have been made in proceedings under s 12 of the Act. There is no provision in the Act or the rules which prevents the correction of the statement of tenure holders in accordance with the appellate or the revisional order Sub-s (3) of s 12 in clear terms lays down that the decision of the Consolidation Officer shall, except as otherwise provided by or under this Act, be final That is to say, if the Consolidation Officer's decision is not appealed against it becomes final If, however, an appeal is taken from it, then it would be the appellate decision which would be final So also if a revision is filed against the appellate decision then it is the decision in revision which would be final In other words, the decision of the Consolidation Officer would be super imposed by the decision in the appeal or revision as the case may be and it is the entry in accordance with that decision which would serve as the basis of particulars in respect of each tenure holder contemplated under s 19(1)(*a*) of the Act

We have already pointed out above that the decision in *Ram Bharosey Lal's* case (1) lays down the correct law and mere publication of the statement of tenure holders under s 19 pending an appeal or a revision in proceedings under s 12 of the Act would

(1) 1964 R D 411

not operate as stay of the hearing of such appeal or revision Therefore, the appellate authority or the revisional authority, as the case may be, is bound to proceed with the hearing and arrive at a decision On a correct appreciation of the scheme under the Act it appears that it was never contemplated that the stage for framing of statement of principles or for framing of statement of proposals will be reached before the statement of tenure holders that is the village records have finally been corrected but if in practice the Consolidation authorities do not await the final decision in such appeals or revisions and proceed with the subsequent stages, then it only means that the officers are proceeding provisionally and would regularise the work of the subsequent stage finally after the decisions in the pending appeals or revisions in the earlier stage have become known and necessary corrections made In other words the proceedings in subsequent stage remain subject to correction according to final decisions in the earlier stages But that cannot be a circumstance to be taken into consideration to give a forced interpretation to the provisions of s 20 of the Act and so read it that it permits any person to file objections disputing the correctness or nature of an entry or pointing out any omission in the statement prepared in respect of a tenure holder for such particulars are based on an entry which already under the law would be deemed to be correct In any case, it is always open under sub s (2) of s 38 of the Act to the Consolidation Officer or Settlement Officer (Consolidation) to correct a clerical error apparent on the face of the record in any document prepared under any provision of the Act We have no doubt that if the statement of proposals is prepared on the basis of the particulars contained in the statement of tenure holder or village records which particulars are still to be corrected in accordance with

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the appellate or revisional order then once the appellate order is passed and it becomes final or a revisional order is passed which is at variance with the particulars in respect of a tenure holder either entered in the statement of tenure holders or entered in the statement of proposals, would clearly be a clerical error or an error apparent on the face of the record in documents prepared under the provisions of the Act and both of them can be corrected and brought in accordance with the final decision in the appeal or revision The further proceedings in consolidation then would be in accordance with the correct statements This can be done even though the statement of proposals achieves confirmation under s 23(2) of the Act The power under sub s (2) of s 38 can be exercised at any time before the notification under s 52 is issued

The decision, therefore, in *Ganga Singh's* case (1) proceeded on a wrong assumption and is hereby overruled We respectfully agree with the ratio of the decision in the case of *Roop Naram* v *State* (2) and hold that it has been correctly decided

As far as this petition is concerned the Deputy Director has dismissed the revision arising out of the proceedings under s 12 of the Act Thus, there was no mistake in the statement of proposals published under s 19 of the Act

This petition fails and is dismissed with costs

B DAYAL, J —I agree with brother ASTHANA, J

M H BEG, J —This reference to a Full Bench arises out of a petition under Art 226 of the Constitution seeking writs of *certiorari* to quash the orders of the Deputy Director of Consolidation, the Settlement Officer (Consolidation), and the Consolidation Officer,

(1) 1965 R D 12 (2) 1965 A L J 888

Azamgarh, rejecting the petitioners' objection under s 20 of the U P Consolidation of Holdings Act, 1954 (hereinafter referred to as the Act) as it stood before its amendment in 1958 The petitioners' objection before the Consolidation authorities was that their names were wrongly omitted from the statement of proposals published under s 19 of the Act These statements in C H Form 23, prescribed by r 46, must contain a number of particulars laid down in s 19 of the Act Among the details to be entered in C H Form 23, are the name and parentage of each tenure holder and the class of tenure of each plot in the village which is undergoing consolidation proceedings The petitioners claimed to be Sirdars of plot nos 1011 and 1191 in their village Their objection was rejected by the Consolidation authorities, in proceedings under ss 20 and 21 of the Act, on the ground that this question had already been decided between the same parties in favour of Suraj Bhan, opposite party no 5, who had been held to be the Bhumidhar in previous proceedings under s 12 of the Act

The petitioners contended that the proceedings under s 12 of the Act had not resulted in a final order inasmuch as a revision application under s 48 of the Act was pending against the decision in proceedings under s 12 of the Act, when the petitioners objections under s 20 of the Act were rejected by the Consolidation Officer and the Settlement Officer The Deputy Director, however, had revision applications arising out of proceedings both under s 12 and under s 20 of the Act before him He decided them together by means of the same order on 5th August, 1961 The Deputy Director (C) laconically, observed that he was unable to find any substantial irregularity or illegality in the orders of the authorities below him and dismissed both

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the revision applications. The result was that the Settlement Officer and the Consolidation Officer had disposed of the petitioners' objection under s. 20 of the Act before the revision application of the petitioners under s. 48 of the Act, pending against the decision of the petitioners' case under s. 12 of the Act with regard to plot nos. 1011 and 1191, was finally disposed of.

The petitioners' submission was that proceedings under s. 12 of the Act were superseded by proceedings under ss. 20 and 21 of the Act. This contention was supported by a reference to s. 22(2) which read, after an amendment, as follows:

> "Upon the publication of the Statement of proposals under sub-s. (1) of s. 20 all suits or proceedings in the Court of first instance, appeal reference or revision, in which the question of title or a question whether any person is a Sirdar, Adhivasi or Asami in relation to the same land has been raised, shall be stayed."

The petitioners urged that even if the principles of *res judicata* were to be found embodied in various sections of the Act for proceedings at various stages the principles were only applicable to a case in which there was a final decision. S. 22(2) of the Act was utilised to build the argument that proceedings under the Act, which were not concluded or finalised were meant to be stayed so that it followed that an adjudication under ss. 20 and 21 of the Act was meant to take place in all cases where the prior proceedings under s. 12 of the Act had not reached finality.

A still bolder stand, adopted by Mr. *Sripat Narain Singh* on behalf of the petitioners, was that all matters relating to right or title were meant to be really agitated or to be reagitated and determined afresh by means

of an elaborate trial in proceedings under ss 20 and 21 of the Act Proceedings under s 12 of the Act (as it stood before the amendment of the Act in 1958) were sought to be equated with proceedings in revenue courts for mutation of names and correction of entries in revenue records, and proceedings under ss 20 and 21 of the Act were sought to be placed, by comparison, in the position of regular suits before Civil and Revenue Courts This analogy does not appear to be apt at all It is true that the Consolidation proceedings as found in the U P Act 5 of 1954, seem to proceed upon a distinction between rectification of errors under ss 8 and 9 of the Act and the more elaborate proceedings under s 12 of the Act, which may even raise questions of title referable, through a Civil Judge, to the Arbitrator But, there the similarity ends It may be mentioned here, in passing, that this scheme was replaced, little later, by enlarging the scope of the enquiries under s 9 as it was found after the U P Act XXXVIII of 1958 which amended the original provisions of the Act so as to better serve the objects of Consolidation The line of thinking based upon any possible division of proceedings into those concerned with mere mutations or corrections of entries and those proceedings which decide questions of right or title of tenure holders seems to have been entirely abandoned by the amendment of 1958

We are concerned here with the provisions of the Act as they stood before the amending of U P Act XXXVIII of 1958 Even under the unamended Act, the adjudication under s 12 was as elaborate as one under ss 20 and 21 of the Act It is intended to decide questions of right and title which could be decided at that stage of the consolidation proceedings under the Act just as well as under ss 20 and 21 of the Act S

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12(7) specifically provided that an objection relating to title which could be raised in proceedings under s 12 could not be raised subsequently under s 20(2) or s 34(1) of the Act Moreover, the hierarchy of authorities and Presiding Officers conducting the proceedings at different stages is the same The proceedings pass through the same hands and decisions have to be taken repeatedly by the same officers Furthermore, the basic distinction between mutation proceedings which are primarily meant for fiscal objects of the State, and litigation between parties on questions of individual right and title, is absent here The consolidation proceedings have what may be called a 'consolidated purpose

I think the correct meaning of the various provisions of the Act dealing with finality of orders passed could only be properly understood in the light of the intent gathered from the provisions, viewed as a whole, together with the purpose of the enactment which has to be considered where the language of the enactment itself is not clear It is necessary, in such cases, to keep in mind the malady which an enactment was designed to cure It was said long ago, in *Heydon's* case (1)

"And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and the evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*"

The preamble of the Act shows that the consolidation of agricultural holdings in Uttar Pradesh appeared necessary for the development of agriculture' Its

(1) (1584) 3 Co Rep 8

object has been explained by WANCHOO, J., in *Atar Singh* v *State of U P* (1) The evil it was designed to check the fragmentation of holdings, was also commented upon by DHAVAN, J in *Smt Rani* v *Deputy Director of Consolidation* (2) It is sufficient for me to observe that the Act before us was not meant to deprive persons affected by the process of consolidation of either their substantive or remedial rights with regard to land It provides for the re-adjustment of these rights to the scheme of consolidation formulated under the Act and the adaptation of the scheme to these rights as and when they arose for consideration in the course of a continuing process of consolidation Recourse to ordinary suits in Civil courts was practically barred by s 49 of the Act during the course of consolidation But alternative machinery was provided by the Act for decision of disputes which may arise in the course of consolidation proceedings The elaborate provisions of the Act for determination of various sometimes overlapping—I would like to emphasize that they are overlapping at times—questions involving individual as well as collective rights of villagers affected by the process of consolidation seem to be designed to guard against possible injustices or oversights in the course of preparing and enforcing the scheme The Act affords ample opportunities to all those who could genuinely object to put forward their objections and grievances of various types while there is still time, that is to say before the process which ends with a notification under s 52 of the Act, is finalised The repeated provisions for the filing of objections could not, however, be meant to enable any person to re agitate precisely the same question on the same facts between the same parties at every stage To interpret the provisions in such a way as to allow repeated trials of questions already decided earlier would be to per-

(1) A I R 1950 S C 504 at p 595 (2) 1959 R D 108

mit a misuse of the provisions which would frustrate the objects of the enactment The process of consolidation may be examined a little more closely now

We have to interpret the Act as it stood in its original form when it was notified and published as U P Act No V of 1954 in the *Uttar Pradesh Gazette* on 8th March 1954 This Act divides the process of consolidation into three main parts, and each of the first three parts falls into two halves so that we get the following stages Part I, Revision and Correction of Maps and Records , (Chap 2), (*a*) Preliminary Survey and Report (ss 4 to 8) (*b*) Statement of plots and tenure holders (ss 11 and 12) Part II (Chap 3) Preparation of Consolidation Scheme', (*a*) Statement of Principles (ss 14 to 18), (*b*) 'Statement of Proposals' (ss 19 to 21) and finally Part III Chap 4 "Enforcement of the scheme (ss 24 to 36)

The first part dealt with in Chap 2 of the Act is concerned with Revision and Correction of Maps and Records Here we find that after a declaration by the State Government under s 4 of the Act that a particular district or area is under consolidation from the date specified the duty of preparing and maintaining the maps the Khasras and the annual registers under Chap 3 under Land Revenue Act 1901 is transferred to the Settlement Officer (Consolidation) The functions of the Collector the Assistant Collector and the Tahsildar under the Land Revenue Act, are to be exercised by the Settlement Officer (Consolidation), the Consolidation Officer and the Assistant Consolidation Officer so long as the area remains under consolidation operations The Assistant Consolidation Officer is then required to examine and test the accuracy of the village maps, Khasras and the current annual registers by making a field to field Partal of the entire village The

Assistant Consolidation Officer is also required to prepare a statement showing the mistakes discovered and the nature of existing disputes about these After that the Assistant Consolidation Officer has to make a report to the Settlement Officer, under s 8 of the Act, who may hold an enquiry and direct corrections to be made There is a provision for a further Partal by the Assistant Consolidation Officer before making a correction in the Annual Register and there is an appeal to the Consolidation Officer from the decision made by the Assistant Consolidation Officer The decision of the Consolidation Officer is final under s 8(4) of the Act except as otherwise provided by or under this Act It appears that this stage is only concerned with the preliminary survey and the result of the Partal which was to be carried out by the Assistant Consolidation Officer under the Act This survey could not finally determine questions of right or title The decision of the Consolidation Officer was apparently only final as regards the entries made in the annual registers after the survey and not on other matters concerning the rights of tenure holders with which s 11(1) deals These entries would raise rebuttable presumptions of correctness, but they could not conclude matters of right or title evidenced by them

The second half of the process covered by the Revision and Correction of Maps and Records takes place under ss 11 and 12 of the Act Here we find that the Assistant Consolidation Officer has to prepare statements of plots and tenure holders showing not only the area, the nature of the soil, the revenue or rent the hereditary sanctioned rates of rent, the rental value but also the character of the rights enjoyed by each tenure holder S 12(1) expressly enables and obliges any person who disputes the correctness or nature of

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an entry in the statement of plots of tenure holders to put forward his objections. It requires the Assistant Consolidation Officer to hear the views of Land Management Committee. S. 12(3) makes a decision of the Consolidation Officer upon a contest final except as otherwise provided by or under this Act. It is important to note here that what is expressly made final is a decision upon a contest and nothing else. An appeal under rule 84 has been held by this Court to be validly provided under the Act. There is also a provision for reference of questions of title for decision by the arbitrator whose decision is to be final under s. 12(4) of the Act. We also find that s. 12(5) provides that "All suits or proceedings in the court of first instance, or appeal in which a question of title in relation to the same has been raised shall be stayed." The term "Court" could not have been used for the Consolidation Officers. It has been evidently used for other authorities before which questions of title relating to the same land had been raised. Such authorities could only be those operating outside the Act.

The next or second part of the consolidation proceedings consists of "Preparation of Consolidation Scheme" dealt with in Chap. 3 of the Act. Here, we find a provision, in s. 14 (1), for the 'Statement of Principles' which has to contain the broad outlines of the layout of the village and the proposed re-arrangement. The particulars which have to be shown here relate to the provisions for common paths, pastures, fisheries, manure pits, Khalihans, cremation grounds, graveyards, Abadi areas, and works of public utility and other common uses. It has to be noted that the matters dealt with here are very distinctly different from those to be mentioned in the statements of plots and tenure holders under s. 11(1) of the Act. These questions do,

nowever affect tenure holders individually and as a whole The tenure holders are also affected by the proposed scheme of allocations of land for various purposes and by proposed formations of blocks The statement of principles under s 14 prepared after keeping in view the principles laid down in s 15 of the Act, is published under s 1(1) of the Act Persons 'likely to be affected by the Scheme of redistribution and allocation of land for various purposes were permitted to object The Consolidation Officer had to decide the objections subject to an appeal before the Settlement Officer whose decision was final under s 17(1) of the Act except as otherwise provided by or under this Act The Settlement Officer (Consolidation) was authorised to make a local inspection before giving his decision and also to hear the Land Management Committee which was to be informed At the conclusion of this stage the Statement of Principles as confirmed and published was declared final under s 18 of the Act It should be noted that the rights of tenure-holders in land are not as such, declared 'final here, but the allocations of land for various purposes under the scheme are finalised at this stage

The second phase of the Preparation of the Consolidation Scheme was then to commence by means of a 'statement of proposals' prepared under s 19(1) of the Act An examination of the particulars prescribed by s 19 for the statement of proposals shows that it is meant to give combined results of proceedings under ss 11 and 14(1) of the Act after the objections at the earlier stages have been disposed of In fact, the statement of proposals under s 19(1) has to take place in accordance with the statement of principles as confirmed and published under s 18 of the Act In addition at this stage reasons have to be given in support of the

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proposed allotments to tenure-holders. Certain additional matters such as compensation for trees, wells buildings or other improvements are to be mentioned in the statement of proposals. The statement of proposals is also to be preceded by consultation with the Land Management Committee and in case of a difference between the Assistant Consolidation Officer and the Land Management Committee the decision of the Settlement Officer on the question on which there is a difference is declared final under s. 19(5) of the Act. The statement of proposals is then published under s. 20, sub-s. (1). The Assistant Consolidation Officer may, if necessary, hear parties, under s. 21(1) of the Act, on objections made under s. 20(1) by any person likely to be affected by the proposals. The officer then reports to the Consolidation Officer who disposes of the objections after hearing parties and their evidence. There is an appeal to the Settlement Officer (Consolidation) under s. 21(2). The appellate order of the Settlement Officer (Consolidation) is final except as otherwise provided by or under this Act." The Consolidation Officer and the Settlement Officer (Consolidation) have, before deciding cases under s. 21, to make local inspections after giving due notice to the parties and the Land Management Committee.

We also find that there is a provision, in s. 22 sub-s. (1) of the Act, for reference of questions of title to an arbitrator by the Consolidation Officer. It is in this connection that it was provided in s. 22(2) as it was originally worded that "all suits and proceedings in the court of the first instance or in appeal in which a question of title in relation to the same land has been raised shall be stayed." It is clear that here the "suits and proceedings" mentioned are those which were pending in "courts" and which raise questions which

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could be referred to the arbitrator There is no provision at all for an automatic stay of any proceedings before the Consolidation Officer or the Settlement Officer (Consolidation) or the Director of Consolidation The consolidation authorities are not defined or described at all as 'courts anywhere in the Act although the word court is repeatedly used when referring to stay of suits and proceedings relating to title The context in which s 22(2) occurs is precisely similar to the context in which the similar provision in s 12(5) occurs Each of these provisions is followed by the provision that the decision of the arbitrator shall be final' The mere fact that later on questions of Sirdari Adhivasi and Asami right were added after questions of title here by an amendment would not alter the context in which the word court is used here The functions of the consolidation authorities when adjudicating upon rights of individuals are akin to those of courts But they combine the roles of administrators with those of adjudicators in participating in the process of consolidation Even s 38 of the Act gives these authorities only specified powers of Civil Courts and does not equate them with courts for all purposes Therefore I respectfully prefer the interpretation given to the term 'court as used in s 22(5) of the Act, by GUPTA, J in the Division Bench case of *Ram Bharosey Lal* v *Deputy Director of Consolidation* (1) to that adopted by SRIVASTAVA, J in *Ganga Singh* v *Deputy Director of Consolidation* (2)

S 23 of the Act provides for the publication and confirmation of the statement of proposals which is declared "final except in so far as it relates to land which is the subject matter of references made to the Civil Judge and which have not been disposed of till

(1) 1964 R D 411 (2) 1962 R D 107

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then. This section is important for deciding the question before us. It demonstrates that the 'statement of proposals', which also contains particulars specified in s. 11(1) of the Act is not final' until this stage is passed.

The third and the last stage of process of consolidation covers the enforcement of the Scheme dealt with in Chap. 4 of the Act. This part provides for the handing over of possession of plots allotted to the tenure holders and preparation of the new revenue records under s. 27, sub-s. (1) of the Act. The entries in the new records of rights, prepared under sub-s. (1) of s. 27 are declared to be final and conclusive. At this stage there is provision in s. 34(1) of the Act for objections by persons aggrieved only by orders passed on certain matters arising out of compensation for crops (s. 29), transfer of encumbrances (s. 31), and award of costs (s. 33). These objections are to be disposed of by the Consolidation Officer under s. 35 of the Act. But even at this stage, there is a provision in s. 36 sub-s. (1) of the Act that where the objection filed under s. 34 involves a question of title in land and such question has not already been finally determined by a competent court, the Consolidation Officer shall refer it for determination to the Civil Judge having jurisdiction who shall thereupon refer it to the arbitrator'. The decision of the arbitrator is again declared to be final. S. 36-A added by the U. P. Act, 16 of 1957 clarifies that if a question arises in any proceeding under the Act whether a person possessed the rights of a Sirdar, Adhivasi or Asami on any particular land at any particular time, such a question shall not be deemed to raise a question of title.

There was a provision introduced in this part, by an early amendment, which indicated very clearly that

decisions on questions of rights of tenure holders, apart from question of title, remained only provisional until the statement of proposals was confirmed under s 23(2) of the Act This provision, s 26 A, which was deleted in 1958 shows the intentions of the framers of the Act It reads as follows

> Notwithstanding anything contained in ss 27 and 30 the maps and record and the tenure holder s right to land in respect of which the statement of proposals has not become final under sub-s (2) of s 23 shall remain provisional

The provision was repealed by the U P Act, XXXVIII of 1958, perhaps because of some inconsistency with other provisions and s 30 of the Act was considered enough S 30 reads as follows

> With effect from the date on which a tenure holder, in pursuance of the provisions of s 26, enters into possession of the plots allotted to him, his rights, title, interest and liabilities in his original holding shall be extinguished and he shall have the same rights, title, interest and liabilities subject to modification, if any, specified in the final consolidation scheme in the plots allotted to him under s 25'

S 30, which continued with slight modifications, also shows that extinguishment of old rights took place only on the acquisition of new rights under the final consolidation scheme Question relating to nature of rights of tenure holders in plots seem to cut across various stages and are not confined to the stage of proceedings under s 12 of the Act Other questions may arise at particular stages only The reason for this difference appears obvious Rights in particular plots are not static They are altered with devolution, and with

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maturity and loss of rights during the course of the process of consolidation

The general survey made above, of the various stages of the process of consolidation shows that each of the three parts of the process of consolidation is directed towards achieving a separate and distinct set of objects. In the process of attaining these objects questions involving individual rights, sometimes of the same nature or character, may turn up in different forms and contexts or with differing catenations of fact at each stage. Therefore, provision has been made at every stage, for safeguarding these rights by enabling all those who may have possible grievances, which they could not put forward earlier for reasons beyond their control, to object. Decisions upon these objections are at the same time declared to be final. This means that they cannot upon the same facts, be re-agitated between the same parties. In other words the doctrine of *res judicata* was obviously meant to be incorporated in the provisions of the Act whenever finality is given to a decision. I confess that I am unable to see any difficulty in recognising this position clearly. There is nothing difficult or abstruse about the doctrine of *res judicata*. It rests on two well recognised principles, one of public policy, contained in the Roman maxim *'interest republicae ut sit finis litium'* i.e. 'the republic's interests require that litigation must have an end', and another of justice and equity, embodied in another Roman maxim, *'nemo debet bis vexari pro una et eadem causa'* i.e. no man should be vexed twice over for the same cause. Adjudication would lose its purpose if there could be no reasonable finality to the process of obtaining it and both public and private time and resources would be wasted if the process of adjudication were unending or repeated without any justifiable object.

It is not difficult to find the doctrine of *res judicata* whenever it is sought to be embodied in statutory provisions It is well established that s 11 C P C is only one instance of it in a very comprehensive form but even this does not exhaust it Indeed, the doctrine is a logical corollary of the process of adjudication both judicial and quasi judicial It has been described as a principle of universal jurisprudence (*See* American Jurisprudence V 30A, p 371)

Our Supreme Court observed in *Smt Ujjam Bai* v *State of U P* (1)

> The characteristic attribute of a judicial act or decision is that it binds whether it be right or wrong An error of law or fact committed by a judicial or quasi judicial body cannot in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends These principles govern not only the findings of inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction and provided that they keep within those limits their decisions must be accepted as valid unless set aside on appeal Even the doctrine of *res judicata* has been applied to such decisions See *Livingstone* v *West minster Corporation* (2), *Re Birkenhead Corporation* (3) *Re* 56 *Denton Road, Twickenham* (4) *Society of Medical Officers of Health* v *Hope* (5) In *Burn & Co Calcutta* v *Their Employees* (6), this Court said that although

(1) A I R 1962 S C 1621 at p 1630
(2) (1904) 2 K B. 109
(3) 1962 Ch 959
(4) 1963 Ch 61
(5) (1959) 2 W L R 377 at p 391
(6) A I.R. 1957 S C 39-1956 S C R 393 397 and 403 781

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the rule of *res judicata* as enacted by s 11 of the Code of Civil Procedure did not in terms apply to an award made by an industrial tribunal its underlying principle which is founded on sound public policy and is of universal application must apply In *Daryao* v *State of U P* (1) this Court applied the doctrine of *res judicata* in respect of applications under Art 32 of the Constitution

It is clear that the consolidation authorities acting at each stage are performing judicial acts in deciding the rights of contesting parties Therefore, their decisions must bind parties at each stage for the purposes of succeeding stages In *Raghubir Singh* v *D D C* (2), JAGDISH SAHAI, J observed

> "It was contended on behalf of the petitioners that s 11 of the Civil Procedure Code in terms did not apply to proceedings under the Act Whether or not s 11 applies the principles of *res judicata* apply In that case a decision of the Board of Revenue was held to bind parties to it In *Kanizan* v *Ghulam Nabi* (3), SHARMA, J, held that a decision in proceedings under the Act was binding in other proceedings under the Act I respectfully concur with the views expressed in both these cases

It may also be observed that the Division Bench decision of this Court in *Rup Narain* v *State* (4) contains the following observation of DESAI, C J

> "The Legislature probably enacted s 12(7) to give effect to the rule of constructive *res judicata*"

S 12(7) of the Act, reads as follows

(1) (1961) 2 S C A 691 (2) 1960 R D 328
(3) A I R 1965 All 936 1964 A L J 1112 (4) 1962 A L J 888

'12(7)—A question of title in respect of any plot mentioned in the statement in cl (*c*) of sub s (1) of s 11 which might and ought to have been raised under sub s (1) but had not been raised shall not be raised in any objection filed under sub s (2) of s 20, or under sub s (1) of s 34'

It was contended that s 12(7) of the Act shows that the doctrine of *res judicata* under the Act is confined to an application of the principle of constructive *res judicata* in cases where a question of title arises and goes no further This argument overlooks the effect of s 12(7) of the Act even in those cases in which there has been no objection whatsoever under s 12 by a party so that there has been no dispute or adjudication The rule of constructive *res judicata* is a logical corollarly or extension of the principle of *res judicata* It applies in cases where an adjudication which has taken place and enables it to be construed as one which covers matters which could or might have been raised in the course of that adjudication On the other hand, s 12(7) of the Act bars the raising of a question by means of an objection under s 20(2) or s 34(1) even when such an adjudication did not take place but could have taken place on an objection which could and ought to have been made In other words the object of s 12(7) of the Act clearly appears to be to go even beyond the doctrine of *res judicata* This section could not, in my opinion be used to cut down the application of the doctrine of *res judicata* in any way whatsoever It contains within it something more than the principles of constructive *res judicata* itself Its result could be more appropriately, described as an estoppel by record", inasmuch as what has taken place and is recorded and declared final cannot be questioned subsequently by a party which has already had an opportunity to

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object It may be observed here that although the term estoppel by record , as used in English law cor responds broadly to our *res judicata*, it has also a wider connotation It has been explained as follows An estoppel by record is the preclusion to deny the truth of matters set forth in a record whether judicial or legislative and also to deny the facts adjudicated by a court of competent jurisdiction (*See* American Juris prudence 2nd Ed Vol 28, page 600 also Corpus Juris Secundum Vol 31, page 193) It appears that the term can be used for matters formally recorded and declared final by Statute where opportunity to object had been afforded to persons estopped

S 12(1) of the Act may also be now closely examined It reads as follows

> 12 (1) Every person interested in disputing the correctness or nature of an entry to the statement published under s 11 or pointing out any omission therefrom shall within thirty days of the publica tion of the statement under sub s (2) of s 11 file objection if any on the statement before the Assis tant Consolidation Officer in the manner pres cribed "

This provision also imposes an obligation by the use of the word shall , upon a person who could and might raise an objection against an entry to do so at this stage If no objection is raised at this stage there cannot be a decision taken by the Consolidation Officer to which finality could attach under s 12(3) of the Act The decision of the Consolidation Officer can only be taken on objections filed on which the Assistant Consolidation Officer submits a report, 'after hearing the parties, if necessary , under s 12(2) of the Act Therefore, if a party has already objected but omits to take up as a

part of his objections a question which he might and should have taken up the doctrine of constructive *res judicata* could be applied against him If, however, a party does not perform his duty to object, under s 12(1) of the Act, so that there is no adjudication whatsoever upon an objection, which he could and should have put forward he may still be debarred by the principle of estoppel by record from objecting at a subsequent stage because he will be deemed to be aware of the contents of the statement published under s 11(2) of the Act This is as already indicated somewhat wider and different from the principle of *res judicata* S 12(7) seems to have been introduced as a subsequent amendment of the original Act by way of abundant caution, to make this position clear so far as questions of title to land are concerned

Does it follow, from the abovementioned provisions of ss 11 and 12 and 14 to 23 of the Act that objections of the nature contemplated by s 12 are excluded entirely in all cases from the purview of objections under s 20(2) of the Act? The observations made by DESAI, C J in *Rup Narain* v *State* (1) certainly indicate that the answer to this question should be in the affirmative It may however be observed that the question directly arising in that case was whether an objection could be raised for the first time under s 20(2) of the Act against the inclusion of certain land which had ceased to be grove land in the consolidation scheme notwithstanding that the statement of principles, as confirmed and published under s 18 of the Act, showing the land to be within the scheme had become final It was also pointed out there incidentally that the objector had another previous opportunity of objecting to the inclusion of this land in the scheme when the statement of plots and tenure holders was framed under s 11(1) of the Act

(1) 1962 A L J 888

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Thus, the petitioner had neither objected under s. 12(1) nor under s. 16(2) of the Act. It is, however, significant that DESAI, C. J. held: "What prevents certain matters being agitated in an objection is the confirmation and finality of the statement of principles. The statement of facts in that case indicated that, although, the question of inclusion of the land in the consolidation scheme, as land which had lost its character of grove land could be viewed as having overlapped and passed through two previous stages, yet at the third stage of objections under s. 20(2), DESAI, C. J. apparently considered the question as finally determined and settled only at the subsequent or second stage because of the specific provision at the second stage giving finality to that type of question. If finality depends upon specific applicable provisions in the Act, it will be noticed that such provisions relate either to cases where there has been an objection and an adjudication between parties, such as that provided by s. 12(2) of the Act, or to cases where, as provided by s. 12(7) and s. 18 read with s. 16(2), aggrieved persons have had opportunities to object but have allowed them to slip without objecting. They did not go beyond such cases. In other words, all the bars of finality found in the Act can be correlated to and covered by either the principles of *res judicata* or of estoppel by record and do not go further."

It was not absolutely necessary to go beyond applying the principle of estoppel by record, contained in s. 18 of the Act, for deciding *Rup Narain* v. *State* (1), DESAI, C. J., however, did proceed further to determine the scope of objections under s. 20(2) of the Act also. In doing so, he referred, as it was perhaps inevitable, to the scheme of the Act and recorded, as follows the disagreement of the Division Bench with the

(1) 1962 A.L.J. 888 at p. 898.

view expressed by SRIVASTAVA, J in *Ganga Singh* v *Deputy Director of Consolidation* (1) With great respect we do not agree that s 20(2) is not confined to new matters included in the statement of proposals or that an objection can be filed against an entry in a statement of proposals even though there existed previously a right to object to such an entry contained in another statement prepared earlier The words any person are wide enough but their width is controlled by the scope of the objection permitted under s 20(2) If the objection is of the nature contemplated by sub s (2) it can be raised by any person' The reasoning adopted by the Division Bench was (p 892) 'If a consolidation scheme has reached the state of preparation of statement of proposals and a tenure holder has still a right to object to any entry in the records, or in the statement of principles, it would mean upsetting everything that was done previously and undertaking revision of these documents on a large scale and again there would be no finality' It was also observed there (p 892) 'Every provision allowing an opportunity to file an objection after an earlier provision confirming and making final something must mean that the former provision relates to an objection in respect of a matter not confirmed and made final In other words s 20(2) *allows a tenure holder to file an objection against any thing contained in the statement of proposals which has not been confirmed or made final under any of the provisions Such as s* 18' It was also held there (at p 891) The proposals referred to in s 20(2) by which a person should be affected in order that he has a right to file an objection are the new proposals contained for the first time in the statement of proposals They are the proposals mentioned in s 19(1)(*b*)(*c*)(*d*)(*f*) and (*g*) Neither are the particulars specified in cl (*a*) proposals

(1) 1962 R D 107

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though they are required to be recorded in the statement of proposals nor are the areas earmarked for public purposes. The words 'likely to be affected' in s. 20(2) are highly significant. a person already affected by something done previously, (such as the inclusion in the consolidation scheme of his land exempt from consolidation) cannot be said to be a person likely to be affected in future. Here the appellant was already affected by the confirmation and the finality of the statements of plots and tenure holders and of principles which recorded the fact that the grove in dispute was included in the consolidation scheme and was reserved for public purposes. He was therefore not a person contemplated by s. 20(2).

The line of reasoning underlying the abovementioned quotations certainly is that the proposals which a person has had an opportunity of questioning earlier could not be questioned by him after they had attained finality declared by statute. If however going further, the scope of objections under s. 20(2) is also limited in the manner indicated above serious legal and practical difficulties must arise in protecting the rights and titles of persons in land in the course of consolidation which the Act obviously was designed to do. It cannot be overlooked that s. 49 of the Act bars the institution of any suit or other proceedings in any civil court with respect to any matter arising out of consolidation proceedings" and 'in respect to any other matter in regard to which a suit or application could be filed under the provisions of this Act'. Hence, the object of the repeated provisions in the Act for decisions on questions of right and title in land apparently was to enable decisions of any new questions which may arise between two stages of the process of consolidation. These new questions cannot, in my opinion, be restricted to what is new in

the proposals contained in statement of proposals under s 19(1) of the Act They may also arise as a result of fresh facts which may make the contents of statements of proposals incorrect so far as the rights of tenure holders are concerned by the time the stage of objections under s 20(2) is reached although they were correct or could be deemed to be correct at the time of proceedings under s 12 of the Act S 22(1) shows that an objection under s 20(2) was raised as a question of title in or over land which had not already been finally determined This provision also indicates that there may be questions of title left over for the stage of objections under s 20(1) which fall even outside the wide scope of s 12(7) of the Act It appears to me that the scheme of the Act was not only to enable the consolidation operations to progress rapidly and efficiently from stage to stage but also to enable consolidation authorities, instead of ordinary courts to decide new questions of right and title of individuals in land as the consolidation scheme progresses from stage to stage The scheme of the Act is to preserve and not to destroy substantive and remedial rights during the process of consolidation so far as it is reasonably possible to do so

I may illustrate the kind of difficulties which may arise by reference to what has been decided by a Division Bench consisting of DESAI, C J and MANCHANDA, J in *Garala Dhiraj* v *Bhadeshwari* (1) Here it was held that the commencement of consolidation proceedings cannot *ipso facto* prevent the accrual of rights under s 210 of the U P Zamindari Abolition and Land Reforms Act This view has also been taken by G C MATHUR, J in *Ahsan Ali* v *Deputy Director, Consolidation* (2) and by other learned Judges and by me in *Sri Hanuman Rai* v *Deputy Director, Consolidation* (2)

(1) 1966 A L J 162 (2) 1965 A L J 1161
(3) Misc writs nos 610 and 611 of 1963 decided on 7th July 1967

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It follows that rights in land arising by the application of s 210, U P Zamindari Abolition and L R Act may, in some cases, mature in the course of consolidation proceedings They may not be ripe for assertion at the stage of objections under s 12(1) but may be capable of being asserted at the stage of objections under s 20(2) of the Act Again a person may be so far as the record of consolidation proceedings in a village is concerned, apparently affected by what has taken place in proceedings under s 12 of the Act But he may not in the eye of law be really affected by such proceedings inasmuch as he was a minor or a lunatic or a victim of fraud at the stage of proceedings under s 12 of the Act The disability of such a person may have been removed by the time the stage of objections under s 20(2) is reached I confess that I am not able to find any provision in the Act which could bring even such persons suffering from some legal incapacity within the class of persons already affected irreparably by what has already taken place in proceedings under s 12 of the Act But, such persons would fall within the category of persons likely to be affected' If they did not object under s 20(2) in spite of removal of their disabilities before that stage their rights may vanish They would not be able to object at all if the stage for objections of this nature were held to have passed for ever without the possibility of any return or recurrence

It, therefore appears to me that the interpretation put upon the scope of the right to object under s 20(2) in *Rup Narain* v *State* (1) is too narrow It is true that the word 'proposals' as used in s 20(2) can be interpreted if it was absolutely necessary to do this, so as to confine the proposals to what is contained in s

(1) 1962 A L J 888

19(1) (b) (c) (d) (f) and (g) as held by DESAI, C J in *Rup Narain s* case (1) But the objections permitted by s 20(2) appear to be all those which are possible legally against anything contained in the statement of proposals mentioned in s 20(1) which immediately precedes s 20(2) It may be noticed that the statement of proposals as defined in s 19(1) includes the particulars specified in s 11(1) The term proposals has not been defined separately from the statement of proposals in the Act Broadly everything remains a proposal until the scheme is finalised And, the actual effect is only produced when possession is taken under the last part of the process The legal effect of whatever has happened during the process is given in the specific provisions of the Act for it What actually happens at a stage does not necessarily have an unalterable legal effect I have given other reasons also earlier in support of this view when dealing with other provisions Therefore, speaking for myself and with great respect, I prefer the view expressed by SRIVASTAVA, J in *Ganga Singh v Deputy Director, Consolidation* (2) on the scope of objections under s 20(2) when he observed

> There is nothing in this sub section to show that the objections must be confined only to some particular matters or that the objection cannot raise the same point which has already been raised under s 12 but in respect of which the decision had not become final'

The abovementioned statement of the scope of s 20 (2) by SRIVASTAVA, J does not conflict with the view that the objector although not barred by s 20(2) from raising a question of right and title, may yet be prevented from obtaining a fresh adjudication on his objection as he may be barred by the doctrine of *res*

(1) 1962 A L J 688 (2) 1962 R D 107

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judicata or by an estoppel by record But, as I have already indicated I do not with great respect endorse the view taken by SRIVASTAVA, J in *Ganga Singh's* case (1) that proceedings under s 12 of the Act which have not reached finality must necessarily and automatically be stayed by applying s 22(2) of the Act Even if convenience and need for speedy decision were to operate as guiding factors at the stage of objections under s 20(2) I do not see why the consolidation authorities cannot stay the proceedings under s 21 and await final decisions which should be speeded up in proceedings under s 12 of the Act in those cases in which proceedings under s 12 have not reached finality It certainly seems to be contemplated by the Legislature that proceedings under s 12 of the Act will be ordinarily completed before the next stage is taken up Obvious complications and difficulties arise when this is not done

The language of s 20(2) shows that the scope of objections which may (converted into 'shall in 1957) be taken under it is wider than that of objections to entries which 'shall be taken under s 12(1) by a person who can question them Nevertheless, a person not objecting at all under s 12(1), without showing exceptional facts and circumstances preventing him from doing so, will be faced with an estoppel by record when objecting to the same entries under s 20(2) on the same facts Again a person who has already objected under s 12(1), when a final decision on his objection has not been taken should in these exceptional circumstances. object to the same allegedly wrong entries again under s 20(2) But, in such a case, the objector has no right to get a re adjudication or re determination on the same facts The objection he could properly take under s 20(2), in such a case, will be that although he has al

(1) 1962 R D 107

ready objected under s 12(1) there has been no final adjudication Such an objector should ask, under s 20(2) for a rectification of the entry in accordance with the final decision on his objection under s 12(1) so as to present finalisation of the statement of proposals under s 23 of the Act The purpose of the objection at each of the two stages will be to secure the correction of wrong entries In this sense, s 20(2) is another provision where an objection to an entry affecting the right of a tenure holder may be taken But the view that proceedings under ss 20 and 21 of the Act must replace all proceedings under s 12 which have not reached finality so that there is re adjudication or duplication in proceedings under ss 20 and 21, rests upon an erroneous interpretation of s 22(2) S 22(2) was not meant for stay of or wiping off of previous proceedings before the consolidation authorities

I may now deal with the Division Bench decision in *Ganga Singh* v *Deputy Director, Consolidation* (1) where BHARGAVA, J giving the judgment of the Division Bench dismissed a special appeal from the above mentioned judgment of SRIVASTAVA J The first ground of the short decision given by the Division Bench was that the statement of proposals having been confirmed under s 23 of the Act had attained finality Therefore the Court would not issue a writ which was ineffective It appears to me that this ground of decision proceeds upon an application of the doctrine of estoppel by record contained in s 23 of the Act DESAI, C J also applied this principle in *Rup Narain's* case (2) to finalisation under s 18 of the Act The facts of *Ganga Singh's* case (3), as detailed in the judgment of SRIVASTAVA, J, indicated that the petitioner had neither filed a revision under s 48 nor come to this Court for a writ of prohibition to challenge the

(1) 1966 R D 12 (2) 1963 A L J 868.
(3) 1963 R D 107

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jurisdiction of the consolidation authorities to proceed with a re adjudication under s 21 of the Act And, a re adjudication under s 21 of the Act had actually taken place so that the question of Sirdari rights was determined fresh in favour of the respondent who had raised this question again under s 20 of the Act It was not even clear whether this re adjudication was on the same facts as those which existed at the time of the adjudication under s 12 of the Act which had not become final On the other hand, the statement of proposals had become final under s 23 of the Act On these special facts the refusal of this Court to interfere on the first ground mentioned above, under the law as it then stood could not be held to be erroneous The second point decided was that the filing of an objection under s 20(2) of the Act cannot be barred on the ground that a similar objection—i e perhaps not identical—had been filed under s 12 It is true that it was noticed that the objection had been dismissed But that dismissal had not as observed by the Division Bench, attained finality because an appeal was pending from it This proposition also appears to be unquestionable inasmuch as the filing of an appeal is a continuation of the original proceedings The assumption underlying the proposition is that the principle of *res judicata* applied to proceedings under the Act There appears to me to be no inconsistency in holding that an individual's right to file an objection is not barred by a provision while at the same time, taking the view that the trial of the question raised by the objection may be barred by *res judicata* Indeed this appears to me to be the strictly correct way of stating the position The principle of *res judicata* bars retrial and decision once again of what is concluded but not merely the 'raising' of a question Raising does not include trial and decision, the next stages which will be barred where there is a previous

adjudication on the same facts With great respect I may observe that I too am unable to see that the mere filing of an objection under s 12 of the Act or the pendency of that objection bars even the raising of a similar objection under s 20 of the Act before the objection under s 12 of the Act has been finally decid ed Even if the bar of *res judicata* could be spoken of as a bar to the very raising of an objection itself, as distinguished from its trial the bar could not come into existence before the proceeding under s 12 of the Act had reached finality The third ground upon which the Division Bench decision was based was that even if the proceedings under s 21 of the Act were without jurisdiction this Court will not interfere in exercise of its jurisdiction under Art 226 of the Constitution as there was no injustice shown to have been perpetuated The correctness of this ground of decision is not assailed before us I am, therefore, clearly of opinion that there is no need whatsoever to overrule this Division Bench decision which does not lay down any law incorrectly

I may mention that I am not able to accept the pro position that the Division Bench in its decision in *Ganga Singh* v *Deputy Director, Consolidation* (1) must be assumed to adopt by implication, all the rea soning and the points decided in the judgment of SRIVASTAVA J, in *Ganga Singh* v *Deputy Director, Consolidation* (2) A judgment given on an appeal can confirm the conclusion arrived at in the judgment appealed against without adopting all the reasons of the judgment appealed from The *ratio decidendi* of the two judgments has to be determined separately As Professor Arthur L Goodhart put it, in an article on 'Determining the *ratio decidendi* of a case', in

(1) 1965 R D 19 (2) 1962 R D 107

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jurisprudence in Action (1953) (Legal Essays collected by the Association of the Bar of City of New York).

The principle of the case is bound by taking account of the facts treated by the Judge as material and his decision as based on them It is only the facts which the Division Bench considered as material which could enter into a consideration of the principles laid down by it

The view taken by our learned brother NIGAM, J in *Sheoraj Singh* v *Deputy Director, Consolidation* (1) was also placed before us Here it was held relying on the abovementioned Division Bench decision in *Ganga Singh* v *Deputy Director, Consolidation* (2) that a person who had objected under s 12 of the Act but had failed to get a final decision and then neglects to file an objection at the stage of s 20 will 'lose all advantage that might be secured to him by any proceeding or continuation of any proceeding under ss 9 to 12 of the U P Consolidation of Holdings Act In this case, which is apparently governed by the Act as it stood before 1958 the statement of proposals had been confirmed under s 23 of the Act without objections under s 20(2) If a tenure holder's objection under s 12 of the Act has not been finally decided he should certainly point out that when a statement of proposals containing wrong entries is published under s 20(1) of the Act He should not wait until the final decision upon his objections under s 12 and then come to this Court for the correction of an error which he did not question at the proper stage In such a case, an objection under s 20(2) of the Act would not have been barred by the principles of *res judicata* Even if a person has objected under s 12 and that objection has been decided in his favour, but the statement of proposals published under s 20(1) contains

(1) 1967 R D 1 (2) 1965 R D 18

an entry which is contrary to the decision arrived at in proceedings under s 12 of the Act, he should point out this error under s 20(2) which does not bar such an objection However if he has already objected to the entry under s 12 and the objection is decided in his favour after confirmation of the proposals, he could still get the error rectified under s 38(2) of the Act, which could be used in such a case, to prevent loss of the rights of a successful objector under s 12 of the Act Indeed, s 38(2) which was there until 1958, seemed to cast a duty upon the consolidation authorities to rectify such an error *suo motu* It will be observed that NIGAM, J, also held here that the confirmation of proposals under s 23 would not have prejudiced or affected the petitioner s case if he could have filed a revision application under s 48 against some order passed under s 21 This means that failure to object under s 20(2) and to secure an order upon the objection before finalisation of proposals under s 23 must result in the loss of even a fresh or additional right to invoke interference under s 48 which may really arise only after finalisation of proposals under s 23 The normal and regular course of consolidation, contemplated by the Legislature, is that proceedings under s 20 should commence after all proceedings under s 12 have reached finality If, for some reason, they commence before that the objector could not complain of prejudice or substantially of the irregularity for him if he ultimately fails in his objection under s 12 But the position would be different if he actually succeeds under s 12 even after finalisation of proposals under s 23 In such a case, he secures an additional or fresh right to complain which did not exist before Moreover, powers under s 48 do not depend for their exercise upon objections taken under s 20(2) or orders passed under s 21 or any other sec

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tion. They can be exercised by the Director *suo moto* and are expressly made wide enough to cover cases of orders passed as well as proceedings taken. Finalisation under s. 23 is a proceeding taken. It is, therefore expressly subjected to possible interference under s. 48 provided other conditions are satisfied. It is not one of the conditions precedent to interference under s. 48 that some order must have been previously passed upon an objection made through a prescribed channel. The limitation of powers of interference under s. 48 with orders of Deputy Directors came only in 1958. Therefore, such a view seems to go too far and must, with great respect, be overruled. In *Bansidhar* v. *Deputy Director, Consolidation* (1), NIGAM, J., did not go beyond what was laid down in *Sheoraj Singh* v. *Deputy Director, Consolidation* (2). Therefore, this case need not be separately considered.

The only question on which there could be said to be a conflict between the *ratio decidendi* of the Division Bench in *Rup Narain* v. *State* (3) and that of the Division Bench in *Ganga Singh* v. *D. D. C.* (4) relates to the scope of objections under s. 20(2) of the Act. I think the case before us is distinguishable, on facts from both the cases mentioned above. Although, I prefer the *ratio decidendi of Ganga Singh* v. *Deputy Director, Consolidation* (4) on this limited point yet I think that the petitioner before us is not entitled to any relief on the facts of his case. The petitioner had only a technical right to file an objection under s. 20(2) of the Act. He was not able to show any fresh facts between the earlier and the later stage. The petitioner has also not been able to show why the bar of finality imposed by r. 34(3) of the rules made under the Act should not have been applied against him by the Consolidation

(1) 1967 R.D. 61.
(2) 1967 R.D. 1.
(3) 1962 A.L.J. 888.
(4) 1966 R.D. 12.

Officer and the Settlement Officer when they dismissed his objections under s 20(2) of the Act It is true that having filed the revision application under s 48 of the Act against the decision in proceedings under s 12 of the Act, the petitioner could theoretically, have asked the consolidation authorities to await the decision on his earlier revision application before rejecting his objection under s 20(2) It however seems to me that an objection under s 20(2) can be rejected on the ground that the same matter has already been raised and decided finally under s 12 and no new facts are disclosed The petitioner never objected under s 20(2) that a final decision on his revision application against proceedings under s 12 should be awaited Moreover a presumably final decision was already there in this case An appeal filed as of right could certainly postpone finality attached to an order passed by the Consolidation Officer under s 12 of the Act but the mere filing of a revision application does not, either on general principles or on the language of the provisions of the Act or of rules framed thereunder, by itself remove the bar of finality imposed by r 84(3) until the revision application is allowed On the view taken by me the petitioner could have obtained a fresh or additional right if his first revision application were actually allowed The petitioner has not disclosed any possible ground upon which his revision application under s 48 against the decision in proceedings under s 12 of the Act could be allowed so as to remove the bar The earlier decision under s 12 was not assailed as void No want of jurisdiction in giving that decision was even alleged In fact, the revision application filed by the petitioner against decisions in proceedings under s 12 of the Act was actually dismissed before he came to this Court No injustice was shown to have been suffered by the petitioner Even though his right to object under s

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20(2) technically survived his right to obtain re adjudication on the same facts was not shown to survive after the decision under s 12 of the Act The petition before us is liable to be dismissed, on the facts of the case, by applying one of the grounds of the Division Bench decision in *Ganga Singh's* case (1) itself

For the reasons given above, I would dismiss this petition with costs

BY THE COURT —This petition fails and is dismissed with costs

Petition dismissed

(1) 1965 R D 12

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Shah, the Hon'ble Mr Justice Sikri and the Hon'ble Mr Justice Shelat

SMT KALAWATI — APPELLANT,

v

BISHESHWAR — RESPONDENT

1967

August 17.

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

U P Zamindari Abolition and Land Reforms Act, *I of* 1951 *s* 23(1)(b)—*Effect of its deletion by s 6 of U P Land Reforms (Amendment) Act XX of* 1954 *and by s 3 of Act XVIII of* 1956—*Transferee becomes* bhumidhar—*Enforcement of his rights to compensation and rehabilitation grants from 1st July,* 1952

The impact of cl (*b*) of s 23(1) of the Act on the transfer made after 7th July 1949 is that though the transferee by reason of such transfer becomes the intermediary and a *bhumidhar* under s 18 it bars recognition of his rights as such bhumidhar for any of the purposes of the Act whatsoever Instead as a result of the deeming provision in the clause the transferor continues to have those rights notwithstanding the transfer

As a result of the deletion of cl (*b*) as from 10th October 1954 the bar against recognition is removed and the transferee can enforce his rights as from that date The deletion of cl (*b*) by Act XX of 1954 was however prospective Therefore for the period between 1st July 1952 and 10th October 1954 the rights of the transferee under the Act such as the right of compensation and rehabilitation grant would still not be recognised To remove this difficulty the Legislature by s 3 of the Amendment Act 1956 made the deletion of cl (*b*) retrospective from the date of the commencement of the Act with regard to the right of the transferee to compensation and rehabilitation grant

Civil Appeal No 963 of 1964 from the Judgment and Decree, dated the 2nd April, 1963, of the Allahabad High Court, Lucknow Bench in Special Appeal No 30 of 1962

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SMT. KALA WATI v. BISHESHWAR

B P Jha and *C P Lal*, for the Appellant

S S Shukla, for the Respondent

The following judgment of the court was delivered by—

SHELAT, J —This appeal by certificate raises the question of construction of cl (*b*) of s 23(1) of the U P Zamindari Abolition and Land Reforms Act, I of 1951 (hereinafter referred to as the Act) and the effect of its deletion by s 6 of the U P Land Reforms (Amendment) Act XX of 1954 and later by s 3 of the U P Land Reforms (Amendment) Act XVIII of 1956

Some of the relevant facts may first be set out

Prior to 14th June, 1952 Kapurthala Estate was the owner of the mango grove in suit On 14th June 1952 the Estate sold the said grove to the appellant A notice to quit was thereafter served on the respondent tenant but as he failed to deliver possession the Kapurthala Estate and the appellant filed on 12th May, 1954 the suit out of which this appeal arises On 1st October, 1959 the Kapurthala Estate withdrew from the suit leaving the appellant the sole plaintiff The respondent tenant raised several defences in his written statement The trial court raised several issues amongst which Issue no 7 was Whether any rights have accrued in law in favour of plaintiff no 2 under the sale deed dated 14th June 1952 The trial court tried that as a preliminary issue and held that the sale deed in favour of the appellant was void, that she did not acquire thereunder any interest in the said property and in that view dismissed the suit In appeal the learned Civil Judge, Mohanlalganj, held that the sale deed was not void and that after the deletion of cl (*b*) of s 23(1) by Amendment Act, XX of 1954 the appellant was entitled to maintain the suit despite withdrawal by the Kapurthala Estate Consequently, he remanded the case to the trial court for deciding the

rest of the issues Against that order the respondent filed an appeal in the High Court contending once again that the said sale was void and conferred no right title or interest in the appellant and being void from its inception remained void for all time and could not be taken into consideration in spite of the deletion of the said cl (*b*) The learned Single Judge who heard that appeal dismissed it holding that the said sale was a valid transfer that cl (*b*) of s 23(1) only provided a ban against recognition for any of the purposes under the Act and that after its deletion first by Act XX of 1954 and then by Act XVIII of 1956 the appellant could maintain the suit though the Kapurthala Estate had withdrawn therefrom The Division Bench of the High Court which heard the Special Appeal against the judgment of the learned Single Judge differed from the view of s 23(1)(*b*) taken by him allowed the appeal and dismissed the suit

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Counsel for the respondent contended (i) that the effect of s 23(1)(*b*) was that transfers made after 7th July 1949 were void for any purpose whatsoever and (ii) that in any event withdrawal by the Kapurthala Estate from the suit must date back from the inception of the suit and therefore the Division Bench was correct in dismissing the suit To appreciate these contentions it is necessary to read first some of the provisions of the Zamindari Abolition Act

The object of the Act as declared by its long title is to provide for abolition of the Zamindari system involving intermediaries between the tiller of the soil and the State for acquisition of their rights title and interest and to reform the law relating to land tenures consequent upon such abolition and acquisition S 3(12) defines an "intermediary" to mean with reference to any estate a proprietor under proprietor sub pro

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pretor Thekedar permanent lessee in Avadh and permanent tenure holder of such estate or part thereof Cl 18 defines an intermediary grove to mean grove land held or occupied by an intermediary as such S 4 authorises the State Government to declare by notification that as from the date to be specified, all estates shall vest in the State and as from the date so specified all such estates shall stand transferred to and vest in the State except as therein provided S 6 lays down the consequences of the vesting and provides *inter alia* that all rights title and interest of all the intermediaries in every estate in such area as may by notification be specified shall cease and be vested in the State S 18 deals with settlement of certain lands with intermediaries as Bhumidhars and provides that subject to certain sections therein set out all lands in possession of or held or deemed to be held by an intermediary as Sir Khudkasht or an intermediary's grove on the date immediately preceding the date of vesting shall be deemed to be settled by the State Government with such intermediary who shall be entitled to take or retain possession as a Bhumidhar thereof S 23(1) reads as follows

> Notwithstanding anything contained in any law no transfer by way of sale or gift of any estate or part thereof
>
> (*a*) made on or after the first day of July, 1948 shall be recognised for the purpose of assessing the amount of rehabilitation grant payable to the intermediary
>
> (*b*) made after the seventh day of July, 1949 shall be recognised for any purpose whatsoever and the estate shall be deemed to continue to vest in the transferor

Chap III of the Act deals with compensation payable to the intermediary and its assessment and ss 73 and

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74 in Chap IV provide for rehabilitation grant payable to such intermediary By s 6 of the Act XX of 1951 the Legislature repealed cl (b) of s 23(1) In 1956, the Legislature passed another Amendment Act XVIII of 1956 which by s 3 provided that s 6 of the U P Land Reforms (Amendment) Act 1954 deleting cl (b) of sub s 1 of s 23 shall in the matter of assessment and payment of compensation or rehabilitation grant be deemed to have had the effect from the date of the commencement of the Principal Act

As aforesaid, Kapurthala Estate sold the property in question to the appellant before 1st July 1952, when the Act came into operation Therefore, as the law then stood the sale was a valid transaction and vested in the appellant all the rights, title and interest which the Kapurthala Estate possessed in the said land, subject of course to such rights, if any, which the respondent had as a tenant under any tenancy law in force then The question is what was the impact of the Act which was brought into force after the said sale Did the Act prohibit any such sale or declare that such sale to be void and of no effect though a valid when made before the Act came into force? Leaving aside for the time being cl (b) of s 23(1) there is otherwise nothing in the Act which provides that a transfer validly effected prior to 1st July 1952 shall be void and will have no effect There is also nothing in the Act touching the consequence of such a transfer under the Transfer of Property Act

The learned Single Judge of the High Court held that what s 23(1)(b) did was only to preclude recognition of a sale made on or after 7th July 1949 for any purpose whatsoever, that is for any of the purposes under the Act but did not render such a sale void Therefore for purposes under the Contract Act the

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transfer was not invalid and a transfer of property had taken place but for purposes of the U P Zamindari Abolition and Land Reforms Act primarily for assessment of compensation and calculation of rehabilitation grant the transfer was not to be recognised but that does not mean that the transfer was declared void The sale according to him, was thus a valid transfer but it could not be recognised by the courts until the ban in cl (*b*) existed He observed that as the deletion of cl (*b*) by Act XX of 1954, was prospective, so far as the courts were concerned it was a case of devolution of property with effect from 10th October, 1951 Consequently withdrawal in 1959 by Kapurthala Estate from the suit did not affect its maintainability the appellant being on the record as the second plaintiff and the ban against recognition of the sale in her favour having been already removed before the withdrawal

The Division Bench of the High Court disagreed with this view and held that the words any purpose in cl (*b*) were wide enough to include all purposes that therefore the sale could not be recognised that even if those words were given a restricted meaning as the learned Single Judge did, viz for any purpose under the Act it made no difference for no court could recognise the transfer for any purpose under the Act Therefore on 1st July 1952 when the Act came into force the question would arise as to who became the Bhumidhar under the Act the Kapurthala Estate or the appellant Since cl (*b*) placed a ban against recognition of that transfer for any purpose under the Act it was the Kapurthala Estate which became the Bhumidhar as cl (*b*) provided that in the case of a transfer made after 7th July, 1949 the estate was to be deemed to continue to vest in the transferor Accordingly it was the Kapurthala Estate which became the Bhumi

dhari and was entitled to the rights of a Bhumidhar and not the appellant This position continued till 10th October 1954, when cl (*b*) was deleted But since the amendment was prospective it did not serve any useful purpose for it affected transfers made after and not before the amendment was enacted Therefore, the Kapurthala Estate remained the Bhumidhari under s 18 and as such Bhumidhari the Kapurthala Estate alone could sue the respondent for eviction According to the Division Bench s 3 of Act XVIII of 1956 which retrospectively deleted cl (*b*) from the commencement of the Act did not help the appellant for the deletion was for a limited purpose, viz, for assessment and payment of compensation and rehabilitation grant It did not therefore change the position so far as the question as to who became the Bhumidhar on 1st July 1952, is concerned Kapurthala Estate continued to remain the Bhumidhari and its withdrawal from the suit rendered the suit non maintainable as the appellant could not continue the suit as she was not the Bhumidhar In this view the Division Bench held that the Kapurthala Estate was the intermediary on 30th June 1952 and Bhumidhar from 1st July 1952 and this position was not affected by the repeal of cl (*b*) The estate and not the appellant therefore could claim Bhumidhari rights under s 18 to evict the respondent

Counsel for the respondent in support of this view argued that the effect of cl (*b*) was that the transfer was void from its inception and therefore neither the prospective deletion of that clause in 1954 nor the retrospective deletion thereof in 1956 conferred the status of Bhumidhar on the appellant That being the position he argued that the appellant was not entitled to maintain the suit after withdrawal by the Kapurthala Estate therefrom In our opinion it is not possible to accede to these contentions

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SMT. KALA WATI v. SH. HARISHWAR

Shelat J

There is a clear distinction between a transaction being void that is, non existent from its very inception and a ban against its recognition Indeed when it is said that such a transaction is not to be recognised for any purpose whatsoever it postulates that the transaction does exist and is valid but is not to be recognised Recognition means according to Jowitt Dictionary of English Law p 1486 an acknowledgment According to the Shorter Oxford Dictionary (3rd ed) Vol II p 1673, recognition means 'The action or fact of perceiving that some thing person etc, is the same as one previously known, the mental process of identifying what has been known before the action or fact of apprehending a thing as having a certain character belonging to a certain class There is thus a clear distinction between a transaction being void and one though valid and existent which is not to be recognised or acknowledged The Legislature also appears to be fully aware of the distinction between a void transaction and one which is not to be recognised In ss 21 and 16b the Legislature has declared certain transactions therein set out void and of no effect as against cl (*b*) of s 23(1) where it provides only a bar against recognition That being so it is impossible to say that the bar of recognition in cl (*b*) to a transfer made after 7th July 1949 means that such a transfer is void The sale in favour of the appellant was therefore valid and did have the effect of conveying and vesting the ownership of the property in the appellant

What then is the true effect of cl (*b*) ? The sale in favour of the appellant transferred all rights of ownership of the Kapurthala Estate in the appellant and therefore the appellant became the Zamindar in respect of that property S 4 of the Act abolished Zamindari rights and vested those rights in the State Under

s 18 the Zamindar who is the intermediary would become the Bhumidhar and therefore by reason of the sale in her favour it was the appellant who became entitled to the Bhumidhar's rights But for cl (*b*) of s 23(1) it would be the appellant who would have to be recognised as such Bhumidhar and it would be she who would be entitled to the rights of compensation and rehabilitation grant under Chaps III and IV as an intermediary the right to retain possession of the property and to evict a tenant therefrom That is the simple position emerging from ss 4 18 and 23(1)(*b*)

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In the earlier part of its judgment the Division Bench expressed its inability to appreciate as to why the Legislature went out of its way to enact cl (*b*) For it did not matter to the State as to whether it was the transferor or the transferee who became the Bhumidhar But the Legislature had a clear purpose in enacting cl (*b*) and it is because the learned Judges failed to appreciate that purpose that they allowed themselves to deviate from the true construction and object of that clause The Legislature was aware that transfers of Zamindari properties had taken place before the Act came into force and as a result it would be the transferees thereunder who would be the intermediaries and, therefore Bhumidhars under s 18 with rights *inter alia* to compensation and rehabilitation grant The purpose of the Legislature however, was to recognise the original owners that is, the transferors as persons entitled to the rights of Bhumidhars and therefore provided in cl (*b*) that no such transfer is to be recognised for any purpose whatsoever Though therefore such a transfer made the transferee an intermediary and, therefore a Bhumidhar under s 18 cl (*b*) laid down a bar against its recognition The words any purpose whatsoever were used in cl (*b*) as cl (*a*) of

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s 23(1) provided that a transfer made on or after 1st July, 1948 was not to be recognised for the purpose only of assessing rehabilitation grant payable to an intermediary But there are purposes under the Act other than payment of rehabilitation grant such as compensation payable under Chap III and other rights of a Bhumidhar provided in other parts of the Act When s 23(1) is read as a whole it is clear that with respect to transfers made after 7th July 1949 the Legislature wanted to lay down a bar against its recognition for all these purposes also and hence advisedly used the words for any purpose whatsoever that is for all purposes under the Act The Division Bench therefore was not right in saying that cl (*b*) did not serve any useful purpose and that it did not appreciate why the Legislature had enacted that clause It is because this was the purpose of enacting cl (*b*) that the Legislature also enacted a deeming provision under which the estate is to be deemed to continue to vest in the transferor The impact of cl (*b*) on the transfer made after 7th July 1949, is that though the transferee by reason of such transfer becomes the intermediary and a Bhumidhar under s 18 it bars recognition of his rights as such Bhumidhar for any of the purposes of the Act whatsoever Instead as a result of the deeming provision in the clause the transferor continues to have those rights notwithstanding the transfer If the clause had rendered such a transfer void and, therefore non existent, the transferor would have remained the owner of the property and would have the rights of a Bhumidhar under s 18 and there would not have been any necessity of enacting the deeming provision under which the property though transferred is deemed to continue to vest in such transferor

In this view the sale in favour of the appellant was not void but a valid sale It was she who became the

intermediary and it was her rights as such intermediary which s 4 abolished By virtue of the combined effect of ss 4 and 18 she became the Bhumidhar But for cl (*b*) her rights as such Bhumidhar would have been recognised and she would have been entitled to the rights as such Bhumidhar under the Act But by reason of the bar against recognition of the sale no court can recognise and give effect to those rights As the property is deemed to continue to vest in the transferor it is he who can exercise those rights As a result of the deletion of cl (*b*) as from 10th October, 1954 the bar against recognition is removed and the transferee can enforce his rights as from that date The deletion of cl (*b*) by Act XX of 1954 was however prospective Therefore, for the period between 1st July 1952 and 10th October 1954 the rights of the transferee under the Act such is the right to compensation and rehabilitation grant would still not be recognised To remove this difficulty the Legislature by s 3 of the Amendment Act 1956 made the deletion of cl (*b*) retrospective from the date of the commencement of the Act with regard to the right of the transferee to compensation and rehabilitation grant

The position which emerges from this discussion is that when the suit was filed though the appellant was the intermediary and the Bhumidhar under s 18, her right to evict the respondent could not be recognised As the estate was deemed to continue to vest in the transferor, Kapurthala Estate had to join in the suit as a co plaintiff From 10th October, 1954, the bar was removed and the appellant became entitled to maintain the suit in her own right and the withdrawal of Kapurthala Estate as plaintiff no 1 did not affect the maintainability of the suit The contention of Mr *Shukla* that the withdrawal must be deemed to date back to

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the institution of the suit has in our view no force. No such order was made by the trial court which ordered the withdrawal. The withdrawal therefore took place after the bar under cl. (*b*) against recognition of the appellant's rights was deleted and the appellant therefore, had the right to maintain the suit.

The appeal is allowed, the judgment and decree of the Division Bench of the High Court are set aside, the suit is restored and the trial court is directed to proceed with the suit in accordance with law. The respondent will pay to the appellant costs throughout.

Appeal allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Shah, the Hon'ble Mr Justice Sikri and the Hon'ble Mr Justice Shelat

DHARA SINGH APPELLANT, 1967

v August 18

DISTRICT JUDGE MEERUT,

AND ANOTHER RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

U P Kshetira Samitis (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules 1962 *rr* 37(a) 40 *and* 43—*Defence open to returned candidate—Can prove that certain votes should have been counted in his favour*

According to r 37(a) read with r 40 the returned candidate can take any defence to show that he has been validly elected He can allege and prove that certain votes should have been counted in his favour R 43 also places no limitation on the jurisdiction of the Judge

U P Kshetira Samitis (Election of Pramukhs and Up-Pramukhs and Settlement of Election Disputes) Rules 1962 *Sch II, Instruction* 1(5)— *Exhausted paper'—When ballot paper is not an Exhausted paper'*

Where a third preference was recorded on a ballot paper in favour of a continuing candidate while the second preference was for a candidate who had been eliminated at one stage *held* that such a ballot paper will not be an exhausted paper

Civil Appeal no 2232 of 1966 against the Judgment and Order, dated the 22nd July, 1965 of the Allahabad High Court in Civil Miscellaneous Writ Petition no 75 of 1964

S C Agarwala, Anil Kumar and *Shiva Pujan Singh*, for the Appellant

B D Sharma, for the Respondent No 2

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DHARA SINGH v. DISTRICT JUDGE, MEERUT

The following Judgment of the Court was delivered by—

SIKRI, J.—This appeal by special leave is directed against the judgment of the Allahabad High Court dismissing the writ petition under Art. 226 of the Constitution filed by Dhara Singh appellant before us. Dhara Singh had prayed for a writ, order or direction in the nature of *certiorari* quashing the judgment of the District Judge Meerut dismissing the election petition filed by Dhara Singh challenging the election of Pitam Singh to the office of Pramukh Block Jani on 8th July 1962.

Two points were raised before us first that the District Judge had no jurisdiction to count ballot paper no. 0045 in favour of Pitam Singh and that the returned candidate had no right to claim that ballot papers not already counted in his favour should be so counted, and secondly that, at any rate the District Judge erred in law in counting ballot paper no. 0045 in favour of Pitam Singh.

The relevant statutory provisions are as follows. The election is governed by the provisions of the U. P. Kshettra Samitis (Election of Pramukhs and Up Pramukhs and Settlement of Election Disputes) Rules 1962—hereinafter called the Rules. Rs. 37, 39, 40, 43 and 44 are as follows:

> 37. *Relief that may be claimed by the petitioner.*—A petitioner may claim either of the following declarations—
>
> (*a*) that the election of the returned candidate is void;
>
> (*b*) that the election of the returned candidate is void and that he himself or any other candidate has been duly elected.

39 *Recrimination when seat claimed*—When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election

40 *Procedure*—(1) Except so far as provided by the Act or in these Rules the procedure provided in the Civil Procedure Code 1908 in regard to suits shall in so far as it is not inconsistent with the Act or any provisions of these rules and it can be made applicable be followed in the hearing of the election petitions

Provided that—

(*a*) any two or more election petitions relating to the election of the same person may be heard together

(*b*) The Judge shall not be required to record or to have recorded the evidence in full but shall make a memorandum of the evidence sufficient in his opinion for the purpose of deciding the case

(*c*) the Judge may, at any stage of the proceedings, require the petitioner to give further cash security for the payment of the costs incurred or likely to be incurred by any respondent

(*d*) for the purpose of deciding any issue the Judge shall be required to order production of or to receive only so much evidence.

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oral or documentary as he considers necessary,

(e) no appeal or revision shall lie on a question of fact or law against any decision of the Judge,

(f) the Judge may review his decision on any point on an application being made within fifteen days from the date of the decision, by any person considering himself aggrieved thereby,

(g) no witness or other person shall be required to state for whom he has voted at an election

(2) The provisions of the Indian Evidence Act, 1872 (Act no 1 of 1872) shall be deemed to apply in all respects to the trial of an election petition

(3) Before the hearing of an election petition commences or before the final hearing takes place, the petition may be withdrawn by the petitioner or the petitioners as the case may be, by making an application to the Judge requesting for the withdrawal of the petition and upon the making of such an application the petition shall stand withdrawn and no further action shall be taken for its trial

43 *Findings of the Judge*—(1) If the Judge after making such inquiry as he deems fit finds in respect of any person whose election is called in question by a petition, that his election was valid he shall dismiss the petition as against such person and award costs at his discretion

(2) If the Judge finds that the election of any person was invalid he shall either—

(a) declare a casual vacancy to have been created, or

(*b*) declare another candidate to have been duly elected and in either case may award costs at his discretion

44 *Grounds on which a candidate other than the returned candidate may be declared to have been elected*.—If any person who has lodged an election petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the Judge is of the opinion that in fact the petitioner or such other candidate received a majority of the valid votes, the Judge shall after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate as the case may be, to have been duly elected

Provided that the petitioner or such other candidate shall not be declared to be duly elected if it is proved that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election

Relevant part of Sch II to the Rules is as follows —

"*Schedule II—Instructions for the Determination of Result*

In this Schedule—

(1) the expression continuing candidate' means any candidate not elected and not excluded from the poll at any given time,

(2) the expression 'first preference' means the number 1 set opposite the

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name of any candidate the expression second preference similarly means the number 2 the expression third preference the number 3, and so on

(3) the expression next available preference means the second or subsequent preference recorded in consecutive numerical order for a continuing candidate, preferences for candidate already excluded being ignored,

(4) the expression unexhausted paper means a ballot paper on which a further preference is recorded for a continuing candidate

(5) the expression exhausted paper means a ballot paper on which no further preference is recorded for a continuing candidate providing that a paper shall be deemed to be exhausted in any case in which—

(a) the names of two or more candidates whether continuing or not are marked with the same figure and are next in order of preference or

(b) the name of the candidate next in order of preference whether continuing or not, is marked by a number not following consecutively after some other number on the ballot paper or by two or more numbers

The relevant facts are that election for the office of Pramukh of Block Jani was held on 8th July, 1962,

under the provisions of Uttar Pradesh Kshettra Samitis and Zila Parishads Adhiniyam, 1961 (U P Act no XXXIII of 1961)—hereinafter referred to as the Act At the said election following six persons were the candidates

(1) Shri Dhara Singh
(2) Shri Pitam Singh
(3) Shri Mahabir Singh
(4) Shri Sham Singh
(5) Shri Kalloo Singh
(6) Shri Budh Singh

After following the instructions contained in Sch II, the Returning Officer found that Dhara Singh and Pitam Singh had obtained equal number of votes and chose to draw a lot, and declared Pitam Singh as the elected candidate Dhara Singh thereupon filed an election petition under the Act and the Rules raising a number of points The District Judge, who heard the election petition, held that the Returning Officer made a mistake in not crediting Pitam Singh with the third preference in ballot paper no 0045 The District Judge held

> 'The only point that has to be seen is whether this third preference should have been credited to Pitam Singh or not The definition of the expression next available preference' has already been given above Under r 6(*b*) the sub parcels are to be arranged according to the next available preferences The ballot paper does not become exhausted as long as there is a preference recorded in it for a continuing candidate Pitam Singh was a continuing candidate when the ballot paper cast in favour of Sham Singh were to be arranged in

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sub parcels containing the exhausted and unexhausted ballot papers The learned counsel for the petitioner has contended before me that the third preference could not have been credited in favour of Pitam Singh inasmuch as the second preference in favour of Mahabira had not been utilised as he was the first to be excluded on the basis of the first preference votes and his contention is that the third preference cannot be taken into consideration This contention to my mind has no force Under the scheme of the counting as provided in the instructions a voter could have given his preference in the present case up to six preferences as there were six candidates who were seeking election To my mind as long as there is any preference in a ballot paper which has not been exhausted according to the rules that preference has to be taken into consideration and to be credited to the continuing candidate in whose favour the preference is Consequently to my mind the Presiding Officer was in error when he did not count the preference in favour of Pitam Singh recorded in the ballot paper no 0045 Crediting this preference to Pitam Singh, we find that the total number of votes which he obtained comes to 20 as against the total number of 19 in favour of Dhara Singh on the third counting Thus in this case to my mind there was no necessity for drawing the lots and Pitam Singh should have been declared as elected as a result of counting itself as there were only two continuing candidates and out of these continuing candidates Pitam Singh had secured the larger number of votes

It is not necessary to set out the findings on other points which are no longer in issue before us

Dhara Singh then filed a writ petition under Art 226 of the Constitution challenging the declaration given by the Returning Officer and the order of the District Judge, referred to above The High Court held that the District Judge was correct in allotting ballot paper no 0045 to Pitam Singh The High Court also repelled the contention that the District Judge was not entitled to take into account ballot paper no 0045, and to award it to Pitam Singh, because Pitam Singh had not filed any recrimination in the case in order to claim the benefit of the ballot paper The High Court was of the view that this was a case of rebuttal and not recrimination, as held in the Full Bench decision of the Allahabad High Court in *Nathu Ram* v *R P Dikshit* (1) According to it the decision of this Court in *Jabar Singh* v *Genda Lal* (2) was not applicable to the facts of the case

It has been strongly contended before us by the learned counsel for the appellant that the decision of this Court in *Jabar Singh* v *Genda Lal* (2) governs the interpretation of the Rules In that case, this Court was concerned with the interpretation of ss 97, 100(1)(*d*) and 101(*a*) of the Representation of the People Act (43 of 1951) and r 57(1) of the Conduct of Election Rules, 1961 We find that the terms of those sections are different and, in particular, s 100(1)(*d*) is materially different because it uses the words 'that the result of the election, in so far as it concerns a returned candidate, has been materially affected" which do not occur in rr 37 and 39 It was these words which were in part relied on to limit the scope of the enquiry in cases arising under the Representation of the People Act But the language of the rules here is simple and quite different It would be noticed that r 37(*a*)

(1) A I R 1966 All 464 (2) (1964) 6 S C R 54

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is wide and no rule prescribes the grounds on which the election of the returned candidate is to be declared void In this case we are not concerned with r 37(*b*) or r 39 But the learned counsel for the appellant contends that reading rr 37 and 39 together it is clear that the trial of the election petition takes place in two compartments, first to judge whether the returned candidate s election is void, and, then, to decide whe ther any other candidate should be declared to be duly elected He says that it is only in the latter case that any recrimination can be made under r 39 We are unable to agree with this contention It seems to us that according to r 37(*a*), read with r 40, which except for certain section, applies the procedure in the Civil Procedure Code, the returned candidate can take any defence to show that he has been validly elected If the petitioner in the election petition can allege and prove that some votes cast in favour of the returned candidate should be rejected, there is no reason why the returned candidate should not be able to allege and prove that certain votes should have been counted in his favour R 43 which deals with the findings of the Judge also shows that the suggested limitation on his jurisdiction does not exist

It is not necessary to decide in this case whether *Nathu Ram* v *R P Dikshit* (1) was correctly decided or not Accordingly, we hold that the District Judge was entitled to go into the question whether ballot paper no 0045 should have been counted in favour of Puam Singh or not

Coming to the second point, the learned counsel contends that ballot paper no 0045 was an 'exhausted paper within the definition quoted above The con tention seems to be contrary to the definition because the definition expressly says that a ballot paper on

(1) A I R 1965 All 454

which no further preference is recorded for a continuing candidate shall be an exhausted paper On the facts of this case, Pitam Singh was a continuing candidate and there was a preference recorded for him on ballot paper no 0045 But the learned counsel says that this was a third preference and the second preference on this paper was for Mahabir Singh who was eliminated at one stage Now, the fact that Mahabir Singh was eliminated does not make the ballot paper an exhausted paper within the definition given in the Rules We agree with the conclusion of the District Judge on this point

In the result the appeal fails and is dismissed Under the circumstances there will be no order as to costs

Appeal dismissed

SUPREME COURT

APPELLATE COURT

Before the Hon'ble Mr Wanchoo, the Chief Justice, the Hon ble Mr Justice Bachawat, the Hon'ble Mr Justice Ramaswami, the Hon'ble Mr Justice Mitter and the Hon'ble Mr Justice Hegde

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August 22.

THE COLLECTOR, VARANASI APPELLANT,

v

GAURI SHANKER MISRA

AND OTHERS RESPONDENTS

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Defence of India Act, 1939 *s* 19(1)*(f) and Constitution of India, Art* 136—*Appeal to High Court against order of arbitrator—Special leave against the High Court s decision can be granted*

In deciding an appeal under s 19(1)(*f*) of the Defence of India Act 1939 against an order of an arbitrator the High Court functions as a Court and not as a designated person and the decision by the High Court is a determination Hence it is within the competence of the Supreme Court to grant special leave under Art 136 of the Constitution against such a decision

Hanshumar Kishanchand v *Union of India* (1) dissented from

Civil Appeal No 1040 of 1965 from the Judgment and Order dated the 11th November, 1963 of the Allahabad High Court in First Appeal no 60 of 1960

C B Agarwala, (O P Rana with him) for the Appellant

J P Goyal and *Raghunath Singh,* for the Respondents

The following judgment of the Court was delivered by—

HEGDE, J —This appeal by the Collector of Varanasi by special leave under Art 136 of the Constitution

(1) (1959) SCR 1177

is directed against the decision dated 11th November 1963 of the High Court of Judicature at Allahabad, in First Appeal no 60 of 1960 on its file, which in its turn arose from the award made by Shri S B Malik District Judge, Varanasi, in certain land acquisition proceedings under cl (*b*) of sub s (1) of s 19 of the Defence of India Act, 1939 (to be hereinafter referred to as the Act)

Before considering the contentions urged on behalf of the parties, it is necessary to set out the salient facts For the purpose of constructing the Babatpur Aero drome near Varanasi, the Government acquired in the year 1946 about 500 acres of land Compensation in respect of most of the lands acquired was settled by agreement But in respect of the lands with which we are concerned in this appeal, 48 01 acres in extent, no settlement was arrived at Therefore the question of compensation in respect of those lands was referred to the arbitration of Shri S B Malik under cl (*b*) of sub s (1) of s 19 of the Act In view of s 19(1)(*c*), the claimants were entitled to get as compensation the market value of those lands as on the date of acquisition Before the arbitrator as well as the High Court, the parties were agreed that on the material on the record, the market value in question had to be fixed either on the basis of the sale deeds produced by the claimants or by capitalising the annual profits accruing from those lands The arbitrator rejected the sale deeds produced before him He adopted the method of capitalising the annual profits On the question of annual profits also he rejected the evidence adduced on behalf of the claimants He determined the same on the basis of the revenue records for Fasli 1355 read with the evidence of the Naib Tehsildar, Jawal Prasad Aggrieved by the decision of the arbitrator, the claim

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Hegde, J.

ants went up in appeal to the High Court of Allahabad under s 19(1)(*f*) The High Court differed from the arbitrator as to the value to be attached to the sale deeds produced It opined that the sale deeds produced were reliable and that they evidenced genuine transactions The High Court fixed the compensation payable on the basis of Ex A-42 dated 3rd April, 1951 The arbitrator had fixed the compensation at Rs 26,454 12 0 The High Court enhanced the same to Rs 90,446 3 0 It is against that decision that the Collector of Varanasi has filed this appeal after obtaining special leave from this Court under Art 136

Sri *Goyal*, learned counsel for the respondents has raised the preliminary objection that no special leave could have been granted by this Court under Art 136 as the judgment appealed against was neither that of a court nor of a tribunal According to him the High Court while acting under s 19(1)(*f*) was a *persona desig nata* and not a court or a tribunal His argument on this question proceeded thus S 19(1)(*b*) of the Act empowers the Central Government to appoint as arbitrator a person qualified to be appointed a judge of the High Court, Sri Malik who possessed the required qualifications was appointed by the Central Government to act as an arbitrator, it is true that Sri Malik was District Judge of Varanasi at the time of his appointment but in law it was not necessary that the person appointed should have been a District Judge, and much less the District Judge of any particular district, therefore, Sri Malik acted as a designated person and not as a court, hence, the award given by him cannot be considered either as a judgment or as a decree or order it was merely an award, when the matter was taken up in appeal to the High Court, the proceedings did not

cease to be arbitration proceedings its original character continued even before the High Court, therefore the decision made by the High Court should also be considered as an award and further the High Court in making that award should be considered as having functioned as an arbitrator In this case, it is not necessary to go into the question whether the decision of the High Court is a decree, judgment or final order Even according to Sri *Goyal* the decision of the High Court is a determination as contemplated in Art 136 That position he had to concede in view of the decision of this Court in *Engineering Mazdoor Sabha v The Hind Cycles Ltd* (1) In support of his contention that the High Court while acting under s 19 (1)(*f*) was not functioning as a court he placed strong reliance on the decision of this Court in *Hanskumar Kishanchand v Union of India* (2) That case dealt with two cross appeals arising from a decision of the Nagpur High Court under s 19(1)(*f*) Those appeals were brought on the strength of the certificates issued by the High Court on 25th August 1949 under ss 109 and 110 C P C In those cases it was contended that the appeals were not maintainable for two reasons viz (*a*) the decision appealed against is neither a decree judgment or final order and (*b*) the decision in question was not that of a court This Court upheld both these contentions On the second ground taken VISWANATHA SASTRI, J who spoke for the Court observed thus

> Under the law no appeal would have lain to the High Court against the decision of such an arbitrator Thus the provision for appeal to the High Court under s 19(1)(*f*) can only be construed as a reference to it as an authority designated and not as a court

(1) [1963] Supp (1) S C R 625 (2) [1963] 3 S C R 1177

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If the conclusion that the appeal under s. 19(1)(*f*) is only a reference to an authority designated and not an appeal to a court is correct then there is no doubt that this Court could not have granted special leave under Art. 136. Therefore, the real question is whether that decision lays down the law correctly when it stated that a High Court while acting under s. 19(1)(*f*) is not functioning as a court.

There was no dispute that the arbitrator appointed under s. 19(1)(*b*) was not a court. The fact that he was the District Judge, Varanasi, was merely a coincidence. There was no need to appoint the District Judge of Varanasi or any other District Judge as an arbitrator under that provision. S. 19(1)(*f*) provides for an appeal against the order of the arbitrator. That section reads:

> 'An appeal shall lie to the High Court against an award of an arbitrator excepting in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government."

It is not in dispute that in the instant case, the amount fixed by the arbitrator exceeded the amount prescribed by the rules and, therefore, the claimants had a right to go up in appeal to the High Court. We were informed that neither the Act nor the rules framed thereunder prescribe any special procedure for the disposal of appeals under s. 19(1)(*f*). Appeals under that provision have to be disposed of just in the same manner as other appeals to the High Court. Obviously, after the appeal had reached the High Court it had to be determined according to the rules of practice and procedure of that Court. The rule is well settled that when a statute directs that an appeal shall lie to a court

already established then that appeal must be regulated by the practice and procedure of that court This rule was stated by VISCOUNT HALDANE, L C in *National Telephone Co Ltd v Postmaster General* (1) thus

> When a question is stated to be referred to an established court without more it, in my opinion imports that the ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decision likewise attaches

This statement of the law was accepted as correct by this Court in *National Sewing Thread Co Ltd v James Chadwick and Bros Ltd* (2) It may be noted that the appeal provided in s 19(1)(*f*) is an appeal to the High Court and not to any Judge of the High Court Broadly speaking Court is a place where justice is judicially administered In *Associated Cement Companies Ltd v P N Sharma* (3), GAJENDRA GADKAR C J speaking for the majority observed

> 'The expression court in the context denotes a tribunal constituted by the State as a part of the ordinary hierarchy of courts which are invested with the State's inherent judicial powers A sovereign State discharges legislative executive and judicial functions and can legitimately claim corresponding powers which are described as legislative executive and judicial powers Under our Constitution, the judicial functions and powers of the State are primarily conferred on the ordinary courts which have been constituted under its relevant provisions The Constitution recognised a hierarchy of courts and to their adjudication are

(1) (1918) A C 549 (2) (1963) A C R 1026
(3) (1965) 2 S C R 366

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normally entrusted all disputes between citizens and citizens as well as between the citizens and the State These courts can be described as ordinary courts of civil judicature They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which is described as judicial process The powers which these courts exercise are judicial powers the functions they discharge are judicial functions and the decisions they reach and pronounce are judicial decisions

The hierarchy of courts in this country is an organ of the State through which its judicial power is primarily exercised

The fact that the arbitrator appointed under s 19 (1)(*b*) is either a designated person or a tribunal—as to whether he is a person designated or a tribunal we express no opinion—does not in any way bear on the question whether the High Court referred to under s 19(1)(*f*) is a court or not Our statutes are full of instances where appeals or revisions to courts are provided as against the decisions of designated persons and tribunals See for example Advocates Act Trade Marks Act Reference in this connection may usefully be made to the decisions in *National Sewing Thread Co, Ltd* v *James Chadwick and Bros Ltd* (1), and the *Secretary of State for India in Council* v *Chelikani Rama Rao* (2)

Prima facie it appears incongruous to hold that the High Court is not a court The High Court of a State is at the apex of the State's judicial system It is a court of record It is difficult to think of a High Court as anything other than a court We are unaware of any judicial power having been entrusted to

(1) (1953) S C R 1028 (2) 43 I A 192

the High Court except as a court Whenever it decides or determines any dispute that comes before it it invariably does so as a court That apart when s 109(1)(f) specifically says that an appeal against the order of an arbitrator lies to the High Court we see no justification to think that the Legislature said some thing which it did not mean

We may now turn our attention to the decision of this Court in *Hanskumar Kishanchand* v *Union of India* (1) on which as mentioned earlier Sri *Goyal* placed a great deal of reliance in support of his preliminary objection The principal question that arose for decision in that case was whether the decision rendered by the High Court under s 109(1)(f) was a judgment decree or final order within the meaning of those words found in s 109 C P C The Court accepted the contention of the Solicitor General appearing for the respondent the Union of India that it was not a judgment decree or final order and that being so no certificate under ss 109 and 110, C P C to appeal to the Federal Court could have been given by the High Court In that case this Court was not called upon to consider the scope of Art 136 Therefore it did not go into the question whether the decision appealed against could be considered as a determination falling within the scope of Art 136 In arriving at the conclusion that the decision in question is not a judgment, decree or final order this Court relied on the decisions in *Rangoon Botatoung Co* v *The Collector, Rangoon* (2) *Special Officer, Salsette Building Sites* v *Dossabhai Bazonji Motiwala* (3) *Manavikraman Tirumalpad* v *Collector of Nilgris* (4) and *Secretary of State for India in Council* v *Hindustan Co operative Insurance Society*

(1) (1969) S C R 1177
(2) 17 C W N 121 37 I L R Bom (1936)
(3) 22 I A 107
(4) I L R 41 Mad 953

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Hegde J

Limited (1) The effect of those decisions is summed up in that very judgment at pp 1180 and 1187 and this is how it is put

> The law as laid down in the above authorities may thus be summed up It is not every decision given by a Court that could be said to be a judgment, decree or order within the provisions of the Code of Civil Procedure or the Letters Patent Whether it is so or not will depend on whether the proceeding in which it was given came before the Court in its normal civil jurisdiction, or before it as a *persona designata* Where the dispute is referred to the Court for determination by way of arbitration as in *Rangoon Botatoung Company* v *Collector, Rangoon* (2) or where it comes by way of appeal against what is statedly an award as in *The Special Officer Salsette Building Sites* v *Dossabhai Bezonji* (3) *Manavikraman Tirumalpad* v *The Collector of the Nilgiris* (4) and the *Secretary of State for India in Council* v *Hindustan Co operative Insurance Society Limited* (5), then the decision is not a judgment, decree or order under either the Code of Civil Procedure or the Letters Patent'

The decisions relied on by this Court merely lay down the proposition that the decision given by the High Court in an appeal against an award is neither a decree judgment or final order None of the aforementioned decisions lays down the proposition that the High Court while exercising its appellate power did not function as a court The observation in this Court's judgment that the provision for appeal to the High Court under s 19(1)(*f*) can only be construed as reference to it as an

(1) 58 I A 269 280 (2) 52 I A 197
(3) 17 C W N 481 87 I L R Bom. (4) I L R 41 Mad 713
806
(5) 58 I A 280

authority designated and not as a court, does not receive any support from those decisions Nor do we find any sound basis for that conclusion With respect to the learned Judges who decided that case, we are unable to agree with that conclusion In our judgment, while acting under s 19(1)(f), the High Court functions as a court and not as a designated person Our conclusion in this regard receives support from the decision of the Judicial Committee in *Secretary of State for India in Council* v *Chelikani Rama Rao* (1) referred to earlier Dealing with the ratio of its decision in *Rangoon Bota toung Co* case (2) this is what Lord SHAW of Dunferm line observed at p 198 of the report)

> 'It was urged that the case of *Rangoon Bota toung Co* v *The Collector, Rangoon* (2) enounced a principle which formed a precedent for excluding all appeal from the decision of the District Court in such cases as the present Their Lordships do not think that that is so In the Rangoon case a certain award had been made by the Collector under the Land Acquisition Act This award was affirmed by the Court, which under the Act meant "a principal civil court of original jurisdiction" Two Judges sat as 'the Court and also as the High Court to which the appeal is given from the award of 'the Court The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings In view of the nature of the question to be tried and the provisions of the particular statute, it was held that there was no right 'to carry an award made in an arbitration as to the value of land further than to the Courts specifically set up by the statute for the determination of that value

(1) 43 I A 192 (2) 89 I A 197

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THE COLLECTOR SURVEY AT COURT SHANKER MISRA

Dua, J.

We have already come to the conclusion that the decision rendered by the High Court under s 19(1)(f) is a determination Hence it was within the competence of this Court to grant special leave under Art 136 But then it was urged on behalf of the respondents that in view of r 2 O XIII of the Rules of this Court as it stood at the relevant point of time this Court could not have granted special leave as the appellant had not applied for necessary certificate under Art 133 of the Constitution In support of this contention, reliance was placed on the decision of this Court in *Management of the Hindusthan Commercial Bank Ltd Kanpur v Bhagwan Das* (1) Under Art 133 a certificate can be asked for filing an appeal against the judgment decree or final order of a High Court As seen earlier this Court ruled in *Hanskumar Kishan chand v Union of India* (2) that the decision rendered by the High Court under s 19(1)(f) is not a decree judgment or final order Hence the provisions of Art 133 are not attracted to the present case Consequently this case is taken outside the scope of the above mentioned r 2 of O XIII As a measure of abundant caution the appellant has filed CMP 2325 of 1967 praying that this Court may be pleased to excuse him from compliance with the requirements of O XIII r 2 In view of the decision of this Court in *Hanskumar Kishan chand v Union of India* (2), no useful purpose would have been served by the appellants applying for a certificate under Art 133 Hence even if we had come to the conclusion that the case falls within the scope of O XIII r 2 we would not have had any hesitation in exempting the appellant from compliance with the requirement of that rule

This takes us to the merits of the case The grievance of the appellant is that the High Court erred in

(1) (1965) 2 S C R 965 (2) 1969 S C R 1177

law in awarding compensation on the basis of Ex 12 The sale evidenced by that deed was effected in the year 1953, nearly five years after the acquisitions with which we are concerned in this case were effected The sale in question cannot be considered as a contemporaneous transaction The Arbitrator has found that after the close of the Second World War the price of landed property had gone up steeply This finding does not appear to have been challenged before the High Court Further, under the deed in question, the land sold was 26 acres in extent The price fetched by such a tiny bit of land is of no assistance in determining the value of the lands acquired On behalf of the respondents, we were asked to determine the compensation of the lands acquired on the basis of sale deed Ex 35 which relates to a sale that took place on 10th June, 1947 which according to the respondents can be considered as a contemporaneous sale We are unable to accept this contention Ex 35 relates to the sale of land measuring 28 acres The vendee under that deed is one of the claimants There is no evidence as to the nature of the land sold under that deed Under these circumstances, very little value can be attached to that document We are also of the opinion that none of the sale deeds produced in this case can afford any assistance to determining the compensation payable to the respondents They do not evidence sales of lands similar to the acquired lands in about the time of the acquisition The High Court did not address itself to the oral evidence adduced in this case for finding out the annual profits for the purpose of capitalisation It rejected the evidence of the Naib Tehsildar For reasons not disclosed the village papers of 1354 *fasli* were not produced by the appellant On the other hand, the village papers of 1355 *fasli* were produced In the first place, those records do not show the rent payable in the year

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THE COLLECTOR VISAKHAPATNAM v. GAURI SHANKER MISRA

Hegde J.

in which the acquisitions took place. The acquisitions in question were made in *fasli* 1354. For the reasons mentioned in its judgment, the High Court felt unable to place reliance on the village papers of *fasli* 1355. We do not think that this Court should see the evidence afresh for determining the just compensation payable to the respondents. That question has to be gone into by the fact finding court. All that we need say is that the High Court was not right in determining the compensation payable to the respondents on the basis of Ex. 42. Hence its decision cannot be sustained.

For the reasons mentioned above, we allow this appeal and set aside the decision of the High Court and remit the case back to that Court for disposal according to law. Before deciding the case afresh the High Court will permit the parties, to adduce additional evidence on the question of compensation, in particular, they will be allowed to produce and prove contemporaneous sale deeds and the revenue records relating to *fasli* 1354. Costs of this appeal shall be costs in the cause.

Appeal allowed.

SUPREME COURT

APPELLATE CIVIL

Before the Hon'ble Mr Justice Shah the Hon'ble Mr Justice Sikri and the Hon'ble Mr Justice Shelat

SUKH RAM AND ANOTHER ..... APPELLANTS,

v

GAURI SHANKAR AND ANOTHER ..... RESPONDENTS

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September 22.

(ON APPEAL FROM THE HIGH COURT AT ALLAHABAD)

Hindu Succession Act, 1956 *s* 14(1)—*Nature of Hindu widow's interest in joint family property—Widow's right of alienation of such property*

The interest to which a Hindu widow became entitled on the death of her husband under s 3(2) of the Hindu Women's Right to Property Act 1937 in the property of the joint family was indisputably her property within the meaning of s 14 of Act 30 of 1956 and when she became full owner of that property she acquired a right unlimited in point of user and duration and unfettered in point of disposition

Held that a male member of a Hindu family governed by the Benares School of Hindu Law is undoubtedly subject to restrictions *qua* alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of the Hindu Succession Act is not subject to any such restrictions

Civil Appeal No 21 of 1965 from the Judgment and Decree dated the 15th March, 1961 of the Allahabad High Court in Second Appeal No 2434 of 1960

N C Chatterjee, (E C Agarwala, Kartar Singh and *P C Agarwala* with him) for the Appellants

J P Goyal and *B P Jha*, for the Respondents

The following judgment of the Court was delivered by :—

SHAH J :—Hulas Singh and Sukhram—the first appellant in this appeal—were two brothers Chidda—

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Shah J

the second appellant—is the son of Sukhram Hukam Singh, Sukhram and Chhidda constituted a Hindu joint family and were governed by the Mitakshara Law of the Benares School Hukam Singh died in 1952 leaving him surviving his wife Kishan Devi On 15th December 1956, Kishan Devi sold a half share in a house and a shop belonging to the joint family to Gauri Shankar Sukhram and his son Chhidda then commenced an action in the Court of the Munsif of Ghaziabad for a decree declaring that the sale by Kishan Devi to Gauri Shankar was without consideration and for an order cancelling the sale deed The suit was dismissed by the Court of first instance the District Court Meerut and the High Court of Allahabad

In this appeal the only question which falls to be determined is whether the sale deed executed by Kishan Devi was binding upon the coparceners of her husband On the death of Hukam Singh in 1952 it is common ground Kishan Devi acquired by virtue of s 3(2) of the Hindu Women's Rights to Property Act 18 of 1937 the same interest in the property of the joint family which Hukam Singh had That interest was limited interest known as the Hindu Woman's estate s 3(1) of the Hindu Women's Right to Property Act 1937 The Parliament enacted the Hindu Succession Act 30 of 1956 which by s 14(1) provided that—

> Any property possessed by a female Hindu whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as a limited owner

The plea raised in the District Court that Kishan Devi was not possessed of the property which she sold to Gauri Shankar was rejected and has not been set up before us Clearly therefore on the express words of

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Shah J

s 14(1) of the Hindu Succession Act, Kishan Devi acquired on 17th June 1956 rights of full ownership in the interest which Hukam Singh had in the property of the family during his life time and she was competent without the consent of the male members of the family to sell the property for her own purposes

But Mr *Chatterjee* for the appellants submits that under the Benares School of the Mitakshara a male coparcener is not entitled to alienate even for value his undivided interest in coparcenary property without the consent of the other coparceners unless the alienation be for legal necessity or if the coparcener is the father for payment by him of his antecedent debts which are not illegal or *avyavaharika*, and it could not have been intended by Parliament to confer upon a widow in a Hindu family a larger right than the right which the surviving coparceners could exercise at the date of the sale by the widow Counsel says that the Parliament by Act 30 of 1956 merely intended to confer upon a Hindu widow rights of full ownership in the interest in property in which she had prior to that Act only a limited interest but did not intend to destroy the essential character of joint family property so as to invest the widow with power to alienate that interest without the assent of the coparceners of her husband

It is true that under the Benares School of the Mitakshara a coparcener may not without the consent of the other coparceners sell his undivided shares in the family estate for his own benefit *Madho Parshad* v *Mehrban Singh* (1) *Balgovind Das* v *Narain Lal* (2) and *Chandra deo Singh* v *Mata Prasad* (3) But the words of s 14 of the Hindu Succession Act are express and explicit thereby a female Hindu possessed of property whether acquired before or after the commencement of the Act holds it as full owner and not as a limited owner The

(1) I R 1 I A 191 (2) I R 20 I A 230
(3) I R 41 All 126 (P C)

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Shah J

interest to which Kishan Devi became entitled on the death of her husband under s 8(2) of the Hindu Women's Right to Property Act 1937 in the property of the joint family was indisputably her property within the meaning of s 14 of Act 30 of 1956 and when she became full owner of that property she acquired a right unlimited in point of user and duration and uninhibited in point of disposition

We are unable to agree with Mr *Chatterjee* that restrictions on the right of the male members of a Hindu joint family form the bed rock on which the law relating to joint family property under the Hindu Law is founded Under the Law of the Mitakshara as administered in the territory governed by the Mahrashtra and the Madras Schools and even in the State of Madhya Pradesh, a Hindu coparcener is competent to alienate for value his undivided interest in the entire joint family property or any specific property without the assent of his coparceners A male member of a Hindu family governed by the Benares School of Hindu Law is undoubtedly subject to restrictions *qua* alienation of his interest in the joint family property but a widow acquiring an interest of that property by virtue of the Hindu Succession Act is not subject to any such restrictions That is however not a ground for importing limitations which the Parliament has not chosen to impose

On the death of her husband, Kishan Devi became entitled to the same interest which Hukum Singh had in the joint family property Of that interest she became full owner on 17th June 1956 and being full owner she was competent to sell that interest for her own purposes without the consent of the male coparceners of her husband

The appeal therefore fails and is dismissed with costs

Appeal dismissed

APPELLATE CIVIL (F B)

Before Mr Justice B N Nigam, Mr Justice G D Sahgal and Mr Justice Lakshmi Prasad

FLORENCE MISRA AND OTHERS

DEFENDANT APPELLANTS

v

DAULAT RAM, RUCHI RAM CHABLANI AND OTHERS PLAINTIFFS-RESPONDENTS

1957 November 20

Indian Limitation Act, 1908 *s 19—Acknowledgment of Debt Loan of Rs 7 000 advanced by the plaintiff to the defedant in January, 1947 Defendant executed a receipt on 1st April 1948 in lieu of principal amount originally advanced—Amount being still outstanding on 1st April, 1948 and there being no novation of contract either on 1st April 1948 or on 1st April 1950—Whether receipt amounts to valid acknowledgment within s 19 of the Act*

Where assuming that a loan of Rs 7 000 was made by the plaintiff to the defendant in January 1947 and the defendant on 1st April 1948 after paying Rs 700 as interest on the principal amount executed a receipt in lieu of principal amount originally advanced in January 1947 the amount being still outstanding on 1st April 1948 and there being no novation of contract either on 1st April 1948 or on 1st April 1950 (when the cause of action is said to have accrued) which had the effect of completely discharging the previous debt and the receipt dated 1st April 1948 says

> mublig 7 000 rupya jiske mut 6 500 hote hain mukhjan saheb mausoof se wasul paya aur muawza pro note wasool paya likhva kaseed likh dia ki sanad rahe

Held on the assumptions indicated above being established the receipt amount to a valid acknowledgment within the meaning of s 19 of Limitation Act 1908

There is no real inconsistency between *Govind Singh* v *Bijai Bahadur* (1) *Jagannath* v *Kn Gurwar Singh* (2) and *Gulam Murtaza* v *Mst Faisunnisan Bibi* (3) in respect of the position that a receipt may serve other conditions being satisfied as an acknowledgment of the earlier debt and extend the limitation for suit based on the earlier debt

Case law discussed

(1) A I R 1929 All 990 (2) A I R 1930 All 869
(3) A I R 1935 All 129

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FLORENCE MISRA v. DAULAT RAM RUGHU RAM CHHABLANI

First Civil Appeal No 18 of 1961 against the decree and judgment dated 12th September 1960 passed by Sri Riaz Ahmad Qureshi Civil Judge Mohanlalganj Lucknow in Regular Suit No 19 of 1951

The facts appear in the judgment

P S Dwivedi, Advocate for Appellant

B K Dhaon and *G B Lal* Advocates for Respondent

The following judgment of the Court was delivered by—

NIGAM, J —The plaintiff Daulat ram Raghu ram Chablam filed suit no 19 of 1951 in the court of Civil Judge Mahbubad Lucknow on 17th February 1951 against Nawin Chandra Paul Misra claiming a decree for Rs 12,170 An amendment of the plaint was allowed by the trial court on 26th October 1951

The plaintiff alleges (in his amended plaint) that in the first week of January 1947 the defendant began borrowing money from the plaintiff On 1st April 1950 all advances were added up and after *taking more cash* the defendant executed a promote and a receipt for Rs 11 280 promising to pay the amount with interest at 9 per cent The plaintiff gave details of the sums advanced One item was a sum of Rs 7 000 paid in cash in the first week of January 1947 The plaintiff further pleaded that if the promote was not admissible in evidence the plaintiff was entitled to a decree on the basis of the original advances which had been acknowledged four times as mentioned in the plaint on one occasion by the receipt dated 1st April 1948 The plaintiff claimed a decree for this sum of Rs 11 280 *principal amount advanced* and Rs 890 interest accrued The cause of action was stated to have accrued on 1st April

1950 (the advance of the loan, promise of interest and execution of receipt and pronote)

The plaintiff thus based his claim on a fresh contract on 1st April 1950 on which date more cash had been advanced but in the alternative based his claim on the original advance of Rs 7 000 (with which alone we are concerned in this reference) acknowledged in the receipt, dated 1st April, 1948 (which is the only acknowledgment relied upon before us)

In his final written statement, dated 27th November, 1951, the defendant denied the plaint case and suggested that the defendant had not taken any loan from the plaintiff

The learned Civil Judge framed five issues, three on 23rd July 1951 and two on 4th December, 1951

In his statement, the plaintiff stated that on 1st April, 1948 the defendant had paid Rs 700 as interest on the previous loan and had executed receipt for Rs 7,000 (Ext 18) in lieu of the principal amount previously advanced P W 5 Soloman Benjamin Elias says that no cash was paid in his presence when Ext 18 was executed The defendant denied having executed Ext 18

The learned Civil Judge held that the payments alleged by the plaintiff were proved and decreed the plaintiff's claim The defendant filed this appeal When the appeal came up for hearing before a Bench of this Court, two issues were remitted to the trial court for findings These issues are

> '1(a) Assuming that the amount of seven thousand rupees was advanced as a loan in January, 1947, as alleged by the plaintiff is the plaintiff s claim in respect of this sum of seven thousand rupees within limitation in view of the allegations contained in para 2(a) of the plaint?

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FLORENCE MISRA v. DAULAT RAM RUCHI RAM CHABLANI

Nigam, J

(b) Whether Ext 10 the letter, dated the 16th of September, 1947, Ext 18 the receipt dated the 1st of April, 1948, and Ext 2 the receipt dated the 1st of April 1950, constitute a valid acknowledgment of the subsisting liability in respect of the debt of seven thousand rupees due from the defendant to the plaintiff?

We are of opinion that it would perhaps have been better if the Bench had decided all questions of fact relating to receipt Ext 18 namely Whether Ext 18 was proved to have been executed by the defendant, whether any money had been paid by either party to the other at the time Ext 18 was executed, whether in fact any sum of rupees seven thousand had been lent by the plaintiff to defendant in January, 1947, and whether the liability to repay this debt still subsisted on 1st April, 1948, rather than entered upon the question of law on assumptions which on scrutiny may not be found to be justified

In his findings, the learned Civil Judge answered the first issue remitted in the affirmative He also held that receipt Ext 18 alone constituted a valid acknowledgment of the subsisting liability in respect of the debt of Rs 7,000 due from the defendant to the plaintiff It appears that the learned Civil Judge assumed that Rs 7,000 were advanced by the plaintiff to the defendant in January 1947, that this liability subsisted on 1st April, 1948, and that Ext 18 had been executed by the defendant

When the appeal again came up for hearing before the Bench, the Bench without proceeding to decide the questions of fact, made this reference to a larger Bench in view of the alleged inconsistency between *Govind Singh* v *Bijay Bahadur* (1) and *Jagan Nath* v *Kunwar*

(1) A I R 1939 All 980

Girwar Singh (1) on the one hand and *Ghulam Murtaza* v *Mt Fasiunnissa Bibi* (2) on the other That is how the matter is before us The question referred to us is

> Assuming that the amount of Rs 7 000 was advanced as a loan in January, 1947 as alleged by the plaintiff, is the plaintiff s claim in respect of the said sum of Rs 7,000 within limitation on the ground that Ext 18 constitutes a valid acknowledgment of a subsisting liability in respect of the said amount of Rs 7,000?'

We are not concerned with the question whether Ext 18 operates as a novation of contract, i e as evidence of a fresh contract between the parties It is neither party s case that the old debt was wiped off and a fresh loan was advanced It is important to bear in mind that the plaintiff s case is that on 1st April, 1948, a sum of rupees seven hundred was paid to him and Ext 18 was executed in lieu of the principal amount originally advanced in January, 1947 That aspect of the matter has not been referred to us and no doubt will be considered by the Bench when the appeal is again placed before it The Bench may also have to determine the questions of fact mentioned by us earlier which have been assumed to exist in the issues remitted to the trial court and in the reference made to us In answering the question put to us, we will confine ourselves to the bare question referred to us leaving all other questions to the Bench hearing the appeal

In the reference we have heard Mr *Dhaon* and Mr *Dwivedi*

In *Govind Singh* v *Bijay Bahadur* (3) the plaintiff had sued on the basis of a promissory note The plaint

(1) A I R 1930 All 368 (2) A I R 1935 All 129
(3) A I R 1929 All 980

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FLORENCE MISRA v. DAULAT RAM RUGHI RAM CHAMANI

Nigam J

case was not inconsistent with the case that the promissory note was executed in lieu of an old debt The promissory note was inadmissible in evidence NIAMATULLAH, J held

> 'The plaintiff applicant is entitled to succeed as regards the principal debt at least on the strength of the acknowledgment contained in the receipt, dated 6th January, 1925

The receipt was held to be "a clear acknowledgment of the defendant being a debtor to the plaintiff to the extent of Rs 349 under a pronote dated 6th January, 1925

' NIAMATULLAH, J was also of the opinion that a clear and unconditional acknowledgment can itself be the foundation of an action and relied on *Mannam v Seth Rup Chand* (1)

SULAIMAN, J (as he then was) expressed his views thus

> 'I also think that a receipt is ordinarily an acknowledgment of the receipt of consideration, and unless its contents suggest otherwise it does not imply a promise to pay or even an acknowledgment of an existing liability to pay But the recitals in the receipt may suggest that that payment of money was by way of loan and that circumstance would necessarily imply a promise to repay it In such cases the receipt alone with other oral evidence may be sufficient proof of a debt which is recoverable by suit '

The reference to a contemporaneous promissory note in the receipt indicated that the payment was by way of loan Finally SULAIMAN, J, concluded that the previous debt had either been acknowledged or substituted by a new contract including a fresh promise to pay

(1) 88 Indian Appeals 165

In *Jagan Nath* v *Kunwar Girwar Singh* (1) NIAMAT ULLAH, J delivered the judgment of the Bench The argument that as the receipt did not acknowledge the earlier debt it could not be construed as an acknowledgment under s 19 of the Limitation Act was rejected The judgment states

> 'The receipt does not state whether the sum of Rs 1,680 acknowledged thereunder was advanced in cash on its date or was due under the earlier loan transaction It is consistent with either of the two alternatives

The defendant's contention that the receipt evidenced money due under the earlier loan transaction was accepted The Bench held that the receipt should be regarded as a good acknowledgment for the purpose of saving limitation

SULAIMAN, C J was a party to *Ghulam Murtaza* v *Mt Fasiunnissa Bibi* (2) Referring to *Govind Singh* v *Bijay Bahadur* (3) the learned Chief Justice stated

> In that case NIAMATULLAH, J, certainly was inclined to take the view that an acknowledgment, clear and unconditional can itself be the foundation of an action I concurred in the order on the ground that the recitals in the receipt along with the circumstances indicated that there was a renewal of previous debt, so that either the previous debt had been acknowledged afresh or had been substituted by a new contract including a fresh promise to pay The previous debt had not become barred by time and the Bench in that case came to the conclusion that there had been a novation of the contract '

(1) A I R 1930 All 868 (2) A I R 1935 All 129
(3) A I R 1929 All 950

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FLORENCE MISRA v. DAULAT RAM RUGHI RAM CHABLANI

Nigam, J

Referring to the Full Bench case of *Nazir Khan* v *Ram Mohan Lal* (1) the learned Chief Justice stated

> The result of this pronouncement is that where the debt is separable from the promissory note, the transaction being truly independent of it , that debt can be proved although the promissory note was not admissible in evidence

After considering two other decisions *Abdul Rafiq* v *Bhajan* (2) and *Bal Krishna* v *Deb Singh* (3) the learned Chief Justice summed up thus

> It seems to me that there is no inconsistency in any of these decisions except that the view that an unconditional acknowledgment cannot itself be the basis of a suit and furnish a new cause of action has been too broadly stated

We respectfully agree with the view and are of opinion that the decisions in *Govind Singh* v *Bijay Bahadur* (4) *Jagan Nath* v *Kunwar Gurwar Singh* (5) and *Ghulam Murtaza* v *Mt Fasunnissa Bibi* (6) do not decide to the contrary so far as the receipt being an acknowledgment of the previous debt within the meaning of s 19 of the Limitation Act, 1908, is concerned In the case before us we are not concerned with the question whether the receipt Ext 18 furnishes a fresh cause of action That aspect of the matter has been authoritatively pronounced upon in *Hira Lal* v *Badku Lal* (7) In para 12 of the judgment it was laid down that the decision in *Ghulam Murtaza* v *Mt Fasunnissa Bibi* (6), so far as it held that even if an acknowledgment implies a promise to pay it cannot be made the basis of suit and treated as giving rise to a fresh cause of action, did not lay down the correct law It, therefore, appears to us that there is

(1) A I R 1931 All 183
(2) A I R 1932 All 190
(3) A I R 1934 All 76
(4) A I R 1929 All 980
(5) A I R 1930 All 866
(6) A I R 1935 All 189
(7) A I R 1953 S C 295

no inconsistency between these decisions as regards the aspect that the receipt may (if necessary conditions are satisfied) be an acknowledgment of the previous debt and be an acknowledgment within the meaning of s 19 of the Limitation Act 1908 These conditions were listed by SULAIMAN, C J at page 131 in the case of *Ghulam Murtaza* v *Mt Fasiunnissa* (1) as (1) the acknowledgment must have been made before the expiration of the period prescribed for the suit, (2) it must be a clear and unambiguous acknowledgment specifically admitting liability in respect of the debt sued upon and (3) it must be signed by the party or his authorised agent

Applying the law to the facts of the case before him, SULAIMAN, C J, stated

> But these receipts merely refer to the promissory notes which were executed on the same dates and which are inadmissible in evidence The receipts do not purport to acknowledge liability for an earlier debt but merely state that the money had been taken under promissory notes of even dates by the executant They therefore refer to the debts created by the promissory notes themselves and not to pay earlier debt the receipts cannot amount to an acknowledgment of any earlier debts '

The above quoted observations cannot, in our opinion, be taken as is contended by the learned counsel for the appellant, to lay down a general proposition that a receipt with similar language can in no circumstances be taken to amount to an acknowledgment of an earlier loan To maintain such a position would run counter to the provisions of s 95 of the Evidence Act which says

(1) A I R 1925 All 129

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FLORENCE MISRA v. DARLAT RAM RUCHI RAM CHARLANT

Nigam J

> When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense

It is thus obvious that there may be circumstances in a particular case in which even though the receipt employs language similar to that used in the receipt with which SULAIMAN, C J was concerned in the case cited above, it may on evidence appear that the language employed in it was used in a peculiar sense since its plain language is unmeaning in reference to existing facts, and may amount to an acknowledgment of an earlier loan

In this connection we may refer to the DIVISION Bench case of *Ram Chaube* v *Sheo Harakh Tewari* (1) At page 81 of the report it is observed

> We are of opinion that the receipt of 10th June, 1930, Ex 2, is a sufficient acknowledgment of the defendant's liability to repay the loan of 3rd July, 1927 It clearly recites the receipts of Rs 531 by the defendant and it is agreed that on the date of Ex 2, that is 10th June, 1930, nothing was paid by the plaintiff to the defendant Therefore the language of the receipt is on the face of it unmeaning in reference to existing facts In these circumstances extrinsic evidence is permissible to show the true meaning of the language used in the receipt under the provisions of s 95, Evidence Act, 1872"

Though a number of this Court's decisions have been cited before us we are of opinion that a reference to only two other Allahabad cases is necessary *Sheo Nath Prasad* v *Sarjoo Nonia* (2) and *Munshi Lal* v *Hira Lal* (3)

(1) A I R 1933 Oudh 80 (2) A I R 1949 All 220
(3) A I R 1947 All 74

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FLORENCE MISRA v. DULAT R M RUCHI RAM CHABLANI

Nigam, J

The case of *Sheo Nath Prasad* (1) was heard by a Full Bench of five Judges The leading judgments were delivered by DAR, J and MATHUR, J and at page 224 column 2 of the report DAR, J held

> If in relation to a pre existing loan or liability a promissory note is given by the debtor to the creditor the promissory note can operate in one of three ways either as an absolute payment or as a conditional payment or as given by way of collateral security and whether it operates in one way or the other is a question of fact which falls to be determined on evidence in each case '

At page 227 column 2 the same learned Judge summed up as follows

> In my opinion, the law on the subject may thus be stated When a promissory note was given in consideration of a sum of money it is a question of fact in each case whether the sum of money was given as a loan or not as a loan, in the absence of all evidence the presumption is that it was given by way of a loan, and there is a further presumption that the promissory note was given in conditional payment of the loan If by reason of the defect of stamp the promissory note is held inadmissible in evidence, it is open to the plaintiff to prove the loan by giving other evidence including that furnished by a contemporaneous receipt, if there be any '

In the light of this exposition of the law the question whether the transaction on 1st April, 1948, was a fresh contract will have to be gone into by the Bench and our answer to the question posed will be based on the assumption that there was no fresh contract on the 1st of April, 1948

(1) A I R 1943 All 126

1967

FLORENCE MISRA v. DAULAT RAM RUCHI RAM CHABLANI

Nigam J

In *Munshi Lal* v *Hira Lal* (1) BRAUND, J spoke for the Court In para 22 of the judgment the learned Judge held

> Now it is clear that a document said to constitute an acknowledgment has to be construed in the context in which it is given and that, where its language is not clear in itself, the context may be examined to see what it is to which the words refer That is not to say that any equivocation in an acknowledgment can be cured by ascertaining what the probable intention of the acknowledgor was'

This view has not been questioned before us

Only one decision of the Supreme Court need be referred to In para 5 of *Shapoor Fredoom Mazda* v *Durga Prasad Chamaria* (2) it is laid down

> It would be noticed that some of the relevant essential requirements of a valid acknowledgment are that it must be made before the relevant period of limitation has expired, it must be in regard to the liability in respect of the right in question and it must be made in writing and must be signed by the party against whom such right is claimed Oral evidence may be given about the time when it was signed but oral evidence of its contents shall not be received

In para 6, it was clarified that an acknowledgment merely renews the debt, it does not create a new right of action and that 'the statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature or the specific character of said liability may not be indicated in words

(1) A I R 1947 All 74 (2) A I R 1961 S C 1836

Words used in the acknowledgment must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor and it must appear that the statement is made with the intention to admit such jural relationship Such intention can be inferred by implication from the nature of the admission and need not be expressed in words In construing words used in the statements made in writing oral evidence has been expressly excluded but surrounding circumstances can always be considered Stated generally the courts lean in favour of a liberal construction This view has been reiterated by the Supreme Court in *Tilak Ram v Nathu* (1)

On a consideration of the decisions and the arguments before us we are of opinion that as indicated earlier, there is no real inconsistency between *Govind Singh v Bijay Bahadur* (2), *Jagan Nath v Kunwar Girwar Singh* (3) and *Ghulam Murtaza v Mt Fasi unnissa Bibi* (4) in respect of the position that a receipt may serve other conditions being satisfied as an acknowledgment of the earlier debt and extend limitation for a suit based on the earlier debt

We find that the facts of the case in hand are analogous to that of the Oudh case cited above After reciting the fact of execution of a pronote of even date the receipt dated 1st April, 1948, Ext 18 says

> " mublig 7,000 rupya jiska misf 3 500 hote hain mahajan saheb mausoof se wasul paya aur mavza pronote wasool paya lehaza raseed likh dee ki sanad rahe "

(1) A I R 1967 S C 985.
(2) A I R 1929 All 980
(3) A I R 1930 All 388
(4) A I R 1935 All 129

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Nigam J.

A reference to pleading would show that the positive case of the plaintiff respondent is that no amount was advanced by the creditor in cash on 1st April, 1948 and that the said promote was executed in lieu of an earlier loan of Rs 7,000 advanced in January 1947 As against that, the case put forth in the appellant's written statement is that no advance was ever made by the plaintiff respondent It is thus nobody's case that any cash was advanced on 1st April 1948 as consideration of Ext 18 and, as such, the plain language of the receipt Ext 18, which purports to indicate an advance of the sum named in it on the date of its execution necessarily becomes unmeaning Hence it becomes permissible in view of the provision contained in s 95 of the Evidence Act to construe the language of the receipt Ext 18, in the background of the circumstances of the case not in controversy It may be in controversy that no advance was made even in January, 1947 But we are not concerned with that controversy because the reference which has been made to us assumes that an advance of Rs 7,000 was made in January, 1947 as is claimed by the plaintiff respondent We have to bear in mind certain assumptions made in the question posed to us, namely

(1) That a loan of Rs 7 000 was made by the plaintiff to N C P Misra in January, 1947,

(2) That this amount was still outstanding on 1st April, 1948,

(3) That receipt Ext 18 was executed by N C P Misra,

(4) That there was no novation of the contract either on 1st April 1948 or 1st April, 1950 which had the effect of completely discharging the previous debt

The receipt, Ext 18, refers to a pronote probably of even date but we have assumed that there was no novation of the contract on 1st April, 1948 The receipt does not state that any amount was advanced on the date it was executed The language is equally consistent with money having been advanced on the date or being due on account of an earlier loan transaction In the circumstances discussed above it must be taken to have been executed in lieu of an earlier debt The question posed assumes that a loan of Rs 7,000 was advanced in January 1947 and that this amount was still outstanding On 1st April 1948 the loan advanced in January 1947 could still be recovered by suit The receipt is (we assume) a writing signed by N C P Misra The mention of the word pronote clearly implies that the money acknowledged to have been received was to be repaid by the executant of the receipt There is no evidence to indicate that the promissory note executed on 1st April 1948 was in absolute payment of the previous loan. Since the previous loan was still outstanding, there was a jural relationship of creditor and debtor between the parties There can in the circumstances be no doubt that this jural relationship was being consciously admitted

We, therefore conclude that on the assumptions indicated above being established receipt Ext 18 amounts to a valid acknowledgment within the meaning of s 19 of the Limitation Act, 1908 We answer the question put to us in the affirmative

Question answered accordingly

CIVIL MISCELLANEOUS (F B)

*Before the Hon'ble V G Oak, Chief Justice Mr Justice G D Sahgal and Mr Justice Lakshmi Prasad**

1968

January 5

MAL SINGH AND OTHERS PETITIONERS

v

LAKSHA KUMARI KHAITAN AND OTHERS RESPONDENTS

Constitution of India, *Art* 226—*Code of Civil Procedure* 1908 *s* 141 *O* 1 *rr* 1 *and* 2—*Nature of proceedings under Art* 226—*Whether civil proceedings—Applicability of O* 1 *r* 1 *C P C—Joinder of more than one petitioner when permissible*

An application under Art 226 of the Constitution is a proceeding in a Court of civil jurisdiction if it relates to a Civil matter and as such the provisions of O 1 r 1 of the Code of Civil Procedure do apply to such a proceeding but only to the extent they are not inconsistent with the nature of the proceeding Thus the joinder of more than one person under Art 226 can be permitted only where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction the petitioners are jointly interested in the cause or causes of action

OAK C J —An application under Art 226 of the Constitution involving civil rights is a proceeding in a court of civil jurisdiction So the provision of O 1 r 1 C P C is applicable to such a proceeding Even if we assume that a writ petition is not a proceeding in a court of civil jurisdiction and O 1 r 1 C P C in terms does not apply to such a proceeding more persons than one can join in a petition under Art 226 of the Constitution under circumstances in which persons more than one can join as plaintiffs in a suit in accordance with the provisions of O 1 r 1 C P C

Since the High Court exercises Civil jurisdiction under Art 226 S 141 C P C is attracted Consequently the procedure provided in the Code of Civil Procedure in regard to suits has to be followed as far as it can be made applicable

*While sitting at Lucknow

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v
LAKSHI KUMARI KHAITAN

Khurjawala Buckles Manufacturing Co v *Commissioner Sales Tax U P* (1) and *Uma Shanker Rai* v *Divisional Superintendent Northern Railway Lucknow* (2) *held no longer hold good law Narani Rao* v *Ishwar Lal* (3) and *Ramesh* v *Genda Lal Moti Lal Patni* (4) considered and relied on *Annam Adinarayana* v *State of Andhra Pradesh* (5) followed.

Case law discussed

Full Bench reference in W P No 256 of 1966

The facts appear in the judgment

B K Dhaon for Petitioner

R N Shukla and *K S Varma*, for Opposite party no 1

Standing Counsel for Opposite party nos 2 to 4

OAK, C J —The following two questions of law have been referred to this Full Bench

(1) Whether an application under Art 226 of the Constitution is a proceeding in a court of civil jurisdiction and as such the provision of O 1 r 1 of the Code of Civil Procedure would be applicable to such a proceeding?

(2) If the answer to the first question is in the affirmative, then whether persons more than one can join together in a petition under Art 226 of the Constitution in the circumstances in which persons more than one can join together as plaintiffs in a suit in accordance with the provisions of O 1, r 1 of the Code of Civil Procedure?

The dispute between the parties relates to a number of plots, which were owned by Smt Laksha Kumari Khaitan opposite party no 1 in the writ petition which has given rise to the present reference On 5th June, 1961

(1) A I R 1965 All 617 (2) A I R 1960 All 866
(3) A I R 1965 S C 1818. (4) A I R 1966 S C 1445
(5) A I R 1958 A P 16

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Oak C J

these plots were sold in auction in order to realise certain dues that were outstanding against opposite party no 1 The auction sale was confirmed on 8th May 1962 On 26th March 1963 opposite party no 1 moved before the Commissioner, Lucknow an application for setting aside the auction sale dated 5th June 1961 On 21st April 1964, the Commissioner set aside the auction sale On 5th October, 1964 Mall Singh and others moved before the Commissioner an application for recalling his order dated 21st April 1964 The application was rejected by the Commissioner on 18th January 1966 Mall Singh and 20 others have filed the writ petition for getting the two orders dated 21st April 1964 and 18th January 1966 quashed

The writ petition is opposed by opposite party no 1 She raised a preliminary objection that a joint writ petition by 21 persons is not maintainable When the writ petition came up for hearing before one of us, he found some difficulty in following a decision by a Division Bench of this Court on this question He therefore referred the two questions of law quoted above to a Full Bench

On question no 1 Mr *B K Dhaon* appearing for the petitioners relied upon s 141, C P C S 141, C P C states

> 'The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction"

In order to decide whether s 141, C P C is attracted, it becomes necessary to ascertain whether under Art 226 of the Constitution this Court exercise civil jurisdiction This question is closely connected with the question whether a petition under Art 226 is a civil proceeding

In *Khurjawala Buckles Manufacturing Company* v *Commissioner, Sales Tax, U P* (1) it was held by DESAI, C J that the provisions of the Code of Civil Procedure do not govern a proceeding under Art 226 of the Constitution Hence a petition for the quashing of two assessment orders pertaining to two assessment years on one petition or one petition for the quashing of two assessment orders under different taxing statutes cannot be entertained

In *Collector of Monghyr* v *Pratap Singh* (2) it was held by a Full Bench of Patna High Court that a proceeding before the High Court under Art 226 of the Constitution is not a civil proceeding within the meaning of Art 133 of the Constitution

In *A Adinarayana* v *State of Andhra Pradesh* (3) it was held that an application under Art 226 of the Constitution is a proceeding in a Court of civil jurisdiction S 141, C P C is, therefore, directly attracted, and the provisions of Os 1 and 2 of the Code can be invoked so far as they can be made applicable to the proceeding in a writ application under Art. 226,, Ordinarily, two or more persons cannot join in a single petition to enforce separate claims But where the right to relief arises from the same act or transaction, and there is a common question of law or fact, or where though the right to relief claimed does not arise from the same act or transaction, the petitioners are jointly interested in the causes of action, one petition is maintainable at their instance

In *Assistant District Panchayat Officer* v *Jai Narain* (4) it was held by BHARGAVA, C J that if the proceedings on a petition under Art 226 of the Constitution relate to civil rights, they are civil proceedings Being

(1) A I R 1968 All 517
(2) A I R 1962 Pat 180
(3) A I R 1958 A P 16
(4) A I R 1967 All 331

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Oak, C. J.

civil proceedings, the provisions of the Code of Civil Procedure apply to them under s 141, C P C in so far as the provisions of the Code can be made applicable

In *State of Uttar Pradesh* v *Vijay Anand* (1) SUBBA RAO, J observed on page 951

> It is therefore, clear from the nature of the power conferred under Art 226 of the Constitution and the decisions on the subject that the High Court in exercise of its power under Art 226 of the Constitution exercise original jurisdiction, though the said jurisdiction shall not be confused with the ordinary civil jurisdiction of the High Court This jurisdiction, though original in character as contrasted with its appellate and revisional jurisdiction, is exercisable throughout the territories in relation to which it exercises jurisdiction and may for convenience be described as extraordinary original jurisdiction '

The learned Standing Counsel placed reliance upon this decision of the Supreme Court in support of his contention that in dealing with a petition under Art 226 a High Court does not exercise civil jurisdiction All that was emphasised in *Vijay Anand's* case (1) was that the jurisdiction under Art 226 should not be regarded as ordinary civil jurisdiction It does not follow that such jurisdiction cannot be extraordinary civil jurisdiction

In *Ryots of Garobandhu* v *Zamindar of Parlakimidi* (2) the Madras High Court refused to issue a writ of *certiorari* to the Board of Revenue The petitioners requested for a certificate for an appeal to the Privy

(1) A I R 1968 S C 946 (2) A I R 1959 Mad. 722

Council It was held that the impunged order was passed by the High Court in the exercise of civil jurisdiction

In *Narayan Row* v *Ishwarlal* (1) it was held that proceedings before a High Court on a petition under Art 226 in the matter of recovery of income-tax are civil proceedings within the meaning of Art 133(1)(*c*)

In *Ramesh* v *Gendalal* (2) a claim for a sum of money was made before the Claims Officer The claim was discharged by the Claims Officer On appeal the Commissioner Nagpur Division remanded the case to the Claims Officer for disposal according to law Ramesh and others filed before the Bombay High Court a petition under Arts 226 and 227 of the Constitution on the ground that the Commissioner Nagpur Division had no jurisdiction to entertain the appeal The petition was summarily dismissed by the High Court An application for a certificate for an appeal to the Supreme Court was rejected by the High Court When the matter went before the Supreme Court upon special leave, the question arose whether the appellants were entitled to a certificate as of right under Art 133(1)(*a*) and (*b*) HIDAYAT ULLAH J observed on page 1448

> "We have explained what is meant by a civil proceeding and have held that such proceedings must concern civil rights including those arising from status as well as contract Once that test is satisfied the word 'proceeding' is a word of very wide import We have held that the proceeding in the High Court was a civil proceeding and although it was for the exercise of extraordinary original civil jurisdiction, the word 'any' must take in a decision provided it is a judgment decree or final order"

(1) A I R 1965 S C 1818 (2) A I R 1966 S C 45

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Gajendragadkar C. J.

Again on page 1449

> We are concerned here with the exercise of extraordinary original civil jurisdiction under Art 226'

It will be noticed that the Supreme Court repeatedly observed in *Ramesh's* case (1) that the High Court was exercising civil jurisdiction under Art 226 The learned Standing Counsel tried to get over the effect of these observations in two ways Firstly, he pointed out that the case arose from Bombay Bombay High Court had the power to issue writs even before the Constitution of India came into force Allahabad High Court had no such power before 1950 Secondly, the learned Standing Counsel suggested that these observations are *obiter dicta*

It is not possible to accept either of these two contentions It is true that Bombay High Court had the power to issue writs even before 1950 But the whole discussion in *Ramesh's* case (1) is with reference to Art 226 of the Constitution of India There is no reference to the power of Bombay High Court to issue writs before 1950 The question before the Supreme Court was whether in the circumstances of that case the appellants were entitled to obtain a certificate under Art 133 For deciding that question it was necessary to examine the nature of the proceeding before Bombay High Court After carefully considering the nature of the proceeding before Bombay High Court, their Lordships of the Supreme Court concluded that the High Court was exercising extraordinary original civil jurisdiction under Art 226

The decision of the Supreme Court in *Narayan Rao's* case (2) is that when a petition under Art 226 relates

(1) A I R 1966 S C 1419 (2) A I R 1965 S C 1818

to civil rights, the petition gives rise to a civil proceeding The decision of the Supreme Court in *Ramesh's* case (1) lays down that when civil rights are involved, the High Court exercise extraordinary original civil jurisdiction under Art 226

Since the High Court exercises civil jurisdiction under Art 226 s 141 C P C is attracted Consequently the procedure provided in the Code of Civil Procedure in regard to suits has to be followed as far as it can be made applicable One such provision is contained in O I r 1 C P C So, the provision of O 1, r 1 C P C is applicable to a proceeding under Art 226 of the Constitution

It appears that the word 'affirmative' has been used inadvertently for the word 'negative' in the introductory part of question no 2 I shall therefore, dispose of question no 2 on the assumption that the opening words of question no 2 are

> If the answer to the first question is in the negative "

In *Bankim Chandra v Regional Provident Fund Commissioner* (2) it was held that a joint application under Art 226 for quashing several orders is not maintainable

In *Bishwaranjan v Secretary, Ram Krishna Mission* (3) it was held that separate applications must be made for issue of separate writs to quash separate orders

In *Muhammad Ibrahim v Deputy Commercial Tax Officer* (4) it was held that the fact that similar orders are passed in the case of a number of individuals does

(1) A I R 1966 S C 1150
(2) A I R 1968 Pat 311
(3) A I R 1968 Pat 3
(4) A I R 1968 Mad 140

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not mean that the injury caused in a common or class injury so as to justify a single petition

In *Ganapathi Nadar Factory* v *State of Madras* (1) Government by a single notification referred disputes between seven establishments and their workmen to an Industrial Tribunal These establishments filed a single writ petition against the Tribunal and the Government It was held that a single petition was not maintainable

In *Kailash Chandra* v *District Registrar* (2) licences of a number of deed writers were cancelled It was held that a joint writ petition by the former deed writers was not maintainable

In *Ramchand* v *Anandlal* (3) it was held that there must be separate applications by every applicant for every main right or claim sought to be enforced in a writ petition Two or more persons cannot join in a single application to enforce separate rights or claims by way or writs

In *Mount Corporation* v *Director of Industries and Commerce* (4) it was held that if a number of persons have joint interest in the subject matter but possess separate and distinct rights, a joint petition by them under Art 226 is not maintainable O 1, r 1 C P C is not applicable

In *Mandir Thakar Dawara* v *State of Pepsu* (5) it was held that there must be separate applications for separate writs

In *Inder Singh* v *State of Rajasthan* (6) there were 23 separate applications pending before the Anti Ejectment Officer Twenty three separate revisions were filed by the different applicants The 23 cases were disposed of by the Board of Revenue by a single judgment

(1) A I R 1957 Mad 16
(2) A I R 1961 All 61
(3) A I R 1962 Guj 21
(4) A I R 1966 Mys 148
(5) A I R 1955 Pepsu 159
(6) A I R 1954 Raj 155

It was held that it was not proper for the petitioners to file a single petition under Art 226 in respect of all the 23 cases

In *Management of Ram Bow Dyeing Factory* v *Indus trial Tribunal* (1) it was held that the provisions of O 1 of the Code of Civil Procedure cannot be applied to writ proceedings on the strength of the rule laid down by s 141, C P C

In *In re A Gopalakrishnaiya* (2) it was held that two or more persons could not join in a single petition for a writ of *mandamus* to enforce separate claims The principle of O 1 of the Code of Civil Procedure cannot be extended to such a case

In *Halsbury's Laws of England*, Third Edition, Vol 11 of the subject of enforcement claims has been dis cussed on page 83 under section 155

> Two persons cannot join in a single application for an order of *mandamus* to enforce separate claims There must be separate applications for se parate orders, and that although the several appli cants are successors in the office in respect of which the claims arise "

In Extraordinary Legal Remedies by Ferris the ques tion of joinder has been discussed under s 233 on page 275

> The rule is that persons having a common and joint interest in the subject matter in controvercy may be joined as relators while those having se parate and distinct right may not

In *Corpus Juris Secundum*, Vol 14 we find the follow ing passage on page 205

(1) A I R 1959 Mad 1d (2) A I R 1957 A P 81

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'It is improper to join persons who are not jointly interested in the proceedings of which a review is sought, and whose interests are separate and distinct Parties severally affected by the proceedings below must sue out separate writs, although there is but one act to be reviewed and but one record

In *Uma Shanker Rai* v *Divisional Superintendent Northern Railway* (1) it was held by a Division Bench of this Court that in case of a common right it is not open to the persons who are affected by a common order to file a joint writ petition Writ jurisdiction is for the enforcement of an individual right There can be no question of application of O I of the Code of Civil Procedure in such proceedings

O 1, r 1 C P C states

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise '

O 1, r 2, C P C states

' Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient

In *Khem Karan* v *State of U P* (2) there was a single notification under s 4 Land Acquisition Act, and a

(1) A I R 1966 All 366 (2) A I R 1966 All 265

single notifications under s 6 of the Act These notifications affected a large number of persons It was held by SATISH CHANDRA, J that all such persons may file a single petition under Art 226 challenging the validity of such action It will be to the convenience of all concerned and would serve the interests of justice

In *Qwabali* v *Government of Rajasthan* (1) it was held that a joint application by several persons involving common questions was maintainable

In *Abdul Qayum* v *Keshav Saran* (2) the petitioners had a common cause of action, and sought a common relief arising out of identical facts It was held that a joint writ petition by them was maintainable

In *United Motors (India) Ltd* v *The State of Bombay* (3) six corporations and one firm carried on the business of buying and selling motor cars They filed one petition under Art 226 of the Constitution challenging the validity of the Bombay Sales Tax Act, 1952 It was held that the petition was maintainable

In *Manindra Nath* v *Baranagore Municipality* (4) SINHA, J observed on page 295

> "Reference has been made to American Jurisprudence Vol 35, page 81 para 333 In my opinion, such highly technical rules of procedure should not be incorporated in our law This is a poor country and litigation expenses are high Multiplication of legal proceedings should be avoided at all costs"

It is true that there is much support for the view that if a number of persons have separate claims, a joint writ petition is not maintainable But the decision by the

(1) A I R 1960 Raj 152 (3) A I R 1964 All 86
(3) 4 S T C 10 (4) A I R 1966 Cal 291

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Division Bench of this Court in *Uma Shanker Rai's* case (1) and decision by other High Courts are largely based on English and American cases High Courts in India need not feel oppressed by technicalities of English law In dealing with petitions under Art 226 High Courts exercise power conferred upon them by the Constitution of India The power should be so exercised as to advance the course of justice It was not suggested for the respondents that in trying civil suits civil Courts experience any difficulty in operating O 1, r 1, C P C On the contrary, that provision is highly convenient If a number of persons have to place before the Court the same set of facts or have to urge the question of law, there is not much point in insisting that they must file separate writ petitions In the present case there are 21 petitioners They have paid a court fee of Rs 50 on the writ petition If they are ordered to file 21 separate writ petitions, they will have to pay a total court fee of Rs 1 050 That would no doubt be a gain to revenue But gain to revenue is not a circumstance which can outweigh convenience of litigants and administration of justice When a number of persons make the same grievance before the Court, it is usually convenient for the Court and the aggrieved persons to have the whole matter disposed of in a single proceeding

In Constitutional Law of India by Seervai the learned author observes on page 788

> There are cogent reasons for not following the strict technicalities of the English law in India For example, a law for the abolition of zamindaris may affect thousands of people, and it is submitted that it would be unjust and oppressive to drive thousands of persons to file separate

(2) A I R 1960 All 50.

petitions when the only question involved is whether their the Legislature was competent to enact the law or not, and a representative petition will completely dispose of the matter

The provision of O 1, r 1, C P C is permissive The provision is subject to O 1, r 2, C P C Ordinarily, if two or more persons put forward claims involving common questions of law and fact, such claims may be combined in a single suit But if the Court finds that combining a number of claims in a single suit would be embarrassing, it is open to the Court to direct separate trials of different claims The same procedure may be adopted at the hearing of writ petitions Ordinarily, if a number of persons challenge a single order or decisions involving common questions of law and fact, their claims may be combined in a single writ petition But if the Court finds that it will not be convenient to dispose of so many claims in a single writ petition, the court may direct the petitioners to file separate writ petitions

My answers to the two questions referred to the Full Bench are

Question 1—An application under Art 226 of the Constitution involving civil rights is a proceeding in a Court of civil jurisdiction So, the provision of O 1, r 1, C P C is applicable to such a proceeding

Question 2—Even if we assume that a writ petition is not a proceeding in a Court of civil jurisdiction, and O 1, r 1, C P C in terms does not apply to such a proceeding, more persons than one can join in a petition under Art 226 of the Constitution under circumstances in which persons more

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than one can join as plaintiffs in a suit in accordance with the provisions of O 1, r 1, C P C

LAKSHMI PRASAD, J —I have had the advantage of going through the judgment prepared by my Lord the Chief Justice I regret my inability to agree with the answers proposed by his Lordship to the two questions referred to the Full Bench

The questions referred to the Full Bench are

(1) Whether an application under Art 226 of the Constitution of India is a proceeding in a Court of civil jurisdiction and as such the provision of O 1, r 1 of the Code of Civil Procedure would be applicable to such a proceeding?

(2) If the answer to the first question is in the affirmative, then whether person more than one can join together in a petition under Art 226 of the Consutution in the circumstances in which persons more than one can join together as plaintiffs in a suit in accordance with the provisions of O 1, r 1 of the Code of Civil Procedure?

Obviously the word 'affirmative' occurring in question no 2 appears to have been used inadvertently, in so far as having regard to the context in which question no 2 is posed the more appropriate word would be 'negative' I would accordingly proceed on the basis that the point posed in question no 2 arises for consideration only if the answer to the first question is found in the negative

The facts giving rise to the petition out of which arises this reference may be noted briefly For the realisation of the dues payable by opposite party no 1 under the provisions of U P Large Land Holdings Tax Act certain plots were auctioned on 5th June, 1961 and were

purchased by the petitioners That auction sale was confirmed in due course on 8th May, 1962 Subsequent ly on 26th March 1963 opposite party no 1 moved an application before opposite party no 2 (The Commis sioner, Lucknow Division, Lucknow) for setting aside that sale and opposite party no 2, without issue of any notice to the purchasers namely the petitioners set aside that sale on 21st April, 1964 The petitioners moved an application on getting knowledge of the order dated 21st April, 1964 for recalling it but opposite party no 2 rejected that application by his order dated 18th Janu ary 1966 It is thereupon that the petitioners approach ed this Court under Art 226 of the Constitution

On these facts it was contended on behalf of opposite party no 1 that all the 21 petitioners could not join in a single petition and in support of that conten tion reliance was placed on *Uma Shanker Rai* v *Divi sional Superintendent, Northern Railway, Lucknow* (1) It expresses an extreme view in so far as it purports to lay down that more than one person cannot join in a petition under Art 226 of the Constitution except in case of joint ownership The case of *Haji Abdul Qayum* v *Keshav Saran* (2) decided by another Division Bench of this Court lays down that in appropriate circumstanc es more than one person can join in a petition under Art 226 of the Constitution The material observations occur on page 389 in para 5 These read as below

> 'The second point, urged, though very feebly, by learned counsel was that this petition should not have been allowed as it had been filed jointly by more than one person The objection on the face of it, has no force All the 16 writ petitioners had a common cause of action and were seeking a com mon relief arising out of identical facts There

(1) A I R 1960 All 803 (2) A I R 1964 All 396

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was no reason why they should not all join together and seek issue of one single writ so as to serve the object of all the petitioners

The occasion for reference to the Full Bench arose because of the conflict of views expressed in the two Division Bench cases referred to above

The answer of the first question depends on the application or otherwise of s 141 of the Code of Civil Procedure to a proceeding under Art 226 of the Constitution S 141 provides, The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction It shall thus appear that s 141 can be attracted to a proceeding under Art 226 only if it be possible to hold that the same is a proceeding in a court of civil jurisdiction Whatever may have been the view at one stage it is now settled by the decision of Supreme Court in the case, *Narayan Row* v *Ishwarlal* (1) that a proceeding, under Art 226 of the Constitution if it relates to relief against infringement of civil right of a person is a civil proceeding Likewise in view of the observations made by the Supreme Court in the case *Ramesh* v *Gendalal Motilal Patni* (2) which observations have been reproduced in the judgment of Hon ble the Chief Justice there is no escape from the conclusion that in relation to a proceeding under Art 226 of the Constitution seeking relief against infringement of civil right of a person the High Court exercises extraordinary original civil jurisdiction In view of the observations made by the Supreme Court in the aforesaid case it can no more be maintained, as was expressed by some courts in some cases including this Court in the

(1) A I R 1965 S C 1818 (2) A I R 1966 S C 1445 at pp 1448 1449

case of *Khurjawala Buckles Manufacturing Co Tantia para v Commission, Sales Tax, U P, Lucknow* (1) that under Art 226 of the Constitution the High Court exercises neither civil nor criminal jurisdiction but extraordinary jurisdiction So in view of the above cited Supreme Court cases the inevitable conclusion is that proceeding under Art 226 of the Constitution where under relief is sought against infringement of one's civil right is a civil proceeding in a court of civil jurisdiction In that view of the matter s 141 of the Code of Civil Procedure would stand attracted with the result that O 1 r 1 of the Code of Civil Procedure would be applicable to such a proceeding, as far as it can be made applicable

S 141 of the Code of Civil Procedure itself envisages the application of procedure provided by the Code in regard to a proceeding in a court of civil jurisdiction only to the extent the same can be made applicable So merely because s 141 is found attracted to a proceeding under Art 226 of the Constitution it does not follow therefrom that the provision of O 1, r 1 of the Code of Civil Procedure would apply whole hog to such a proceeding In the very words of s 141 it can apply to the extent it can be made applicable Thus we have to fall back upon the nature of a proceeding under Art 226 and the principles governing it in order to ascertain as to what extent the provision of O 1 r 1 of the Code of Civil Procedure can be made applicable to such a proceeding

As pointed out in the case *re A Gopalakrishnayya* (2) the right of a person to apply for an appropriate writ flows from the order that affects him A person desirous of questioning the validity or legality of such an

(1) A I R 1965 All 547 (2) A I R 1957 A P 59

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order is entitled subject to other conditions to apply for such writ It is not open to him to join in the petition other person or persons affected by similar orders—not the same order—for they too have a remedy open to them and the quashing of one order does not necessarily render the other order null and void In this very case after quoting from Halsbury's Laws of England (Third Edition, Volume II, page 88, para 155) that 'Two persons cannot join in a single application for an order of *mandamus* to enforce separate claims There must be separate applications for separate orders, and that although the several applicants are successors in the office in respect of which the claims arise the learned Judge goes on to observe on page 89, This rule is warranted by the nature of the writ proceedings and is calculated to remove great inconvenience which might otherwise result in issuing several writs orders or directions in the nature of writ on a single omnibus petition relating to rights of several persons affected by distinct or separate orders If I may say so with respect to the learned Judge I am in entire agreement with his observations

In the case of *Annam Adinarayana* v *State of Andhra Pradesh* (1) the point in issue is discussed at some length and the earlier authorities are reviewed While making the order of reference I expressed my respectful agreement with the views expressed in the case reported in A I R 1958 A P The judgment in this case is delivered by SUBBA RAO, C J as he then was, on behalf of the Division Bench After discussing the entire legal position he sums up the conclusion in para 10 which appears on page 19 It runs as below

> The legal position may now be summarised An application under Art 226 of the Constitution

(1) A I R 1958 A P 16

of India is a proceeding in a court of civil jurisdiction The provisions of Ors 1 and 2 can be invoked *as far as they can be made applicable to the proceedings in a writ application under Art* 226 Ordinarily, two or more persons cannot join in a single petition to enforce separate claims But where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right to relief claimed does not arise from the same act or transaction, the petitioners are jointly interested in the cause or causes of action one petition is maintainable at their instance"

If I may say so with respect these observations lay down the legal position correctly It means that s 141 of the Code of Civil Procedure is attracted to a proceedings under Art 226 of the Constitution if it is a civil proceeding that is if thereby relief is sought against infringement of one's civil right and as such O 1 r 1 of the Code of Civil Procedure would apply to such a proceeding but only to the extent it can be made applicable It has not to be lost sight of that ordinarily two or more persons cannot join in a single petition to enforce separate claims More than one person can join in a single petition subject to certain conditions the conditions being either where the right to relief arises from the same act or transaction and there is a common question of law or fact or that the petitioners are jointly interested in the cause or causes of action in cases where the right to relief claimed does not arise from the same act or transaction

The extreme view propounded in *Corpus Juris Secundum*, Volume 14 page 205 "It is improper to join persons who are not jointly interested in the proceedings of which a review is sought and whose interests are

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separate and distinct, may not be adhered to but it would be equally not correct to go to the other extreme and lay down as a general proposition that more that one person can join in a petition under Art 226 of the Constitution in all such cases in which more than one plaintiff can join together in a suit in accordance with the provisions of O I r 1 C P C. It may be that under O 1 r 2 C. P C. power is given to the court to require the plaintiffs to elect or order separate trials if it finds that any joinder of plaintiffs may embarrass or delay the trial. That can by itself be not a basis for applying O 1 r 1 in its entirety to a proceeding under Art 226 if otherwise it appears that such an application would be inconsistent with the basic principles governing a proceeding for the issue of a writ be it *certiorari* or *mandamus*

None of the cases cited in the course of arguments before the Bench went to the extent of laying down that the provisions of O 1 r 1 C P C apply without any qualification to a proceeding under Art 226. Of the decided cases cited before the Bench the case of *Manindra Nath Pal* v *Municipal Commissioners of Baranagore Municipality* (1) appears to go the furthest. Even it simply says on page 295 "It would be sufficient to follow analogously the provisions of O 1 C P C"

The cases of this Court which have permitted more than one person to join in a petition under Art 226 and were cited before the Bench are, (1) *Haji Abdul Qayum* v *Keshav Saran* (2) and (2) *Khem Karan* v *State of Uttar Pradesh* (3). I have already reproduced the material observations made in *Haji Abdul Qayum's case* (2). What is laid down on this point in *Khem Karan's case* (3)

(1) A I R 1955 Cal 291 (2) A I R 1964 All 366
(3) A I R 1966 All 284

appears in para 9 of the report at page 257 It runs as below

> To my mind in a single proceeding culminating in a single order affecting a large number of persons all such persons can raise a single complaint to this Court under Art 226 to canvass the validity of such action It will be to the convenience of all concerned and would serve the interests of justice

It shall thus be seen that not a single decided case of this Court has permitted joinder of more than one person in a petition under Art 226 except under conditions under which such joinder is envisaged in the case reported in *Annam Adinarayana's* case (1) There can be little doubt that the weight of authority even in this country is that a number of persons who have separate claims cannot maintain a joint writ petition That such is the position has been recognized by Hon'ble the Chief Justice when he observes It is true that there is much support for the view that if a number of persons have separate claims a joint writ petition is not maintainable I see no good reason to go beyond what has been laid down in *Annam Adinarayana's* case (1) I cannot see as to how requiring a person having a separate claim to bring separate petition amounts to hampering justice On the other hand if an omnibus petition is permitted it may result in embarrassment and delay It may be that under O 1, r 2, C P C the Court would be entitled to direct separate trial in appropriate circumstances but even that would mean some delay and consequent inconvenience to all concerned So whether considered on the basis of convenience or on the ground of principle I am firmly of opinion that joinder of more than one person in a petition under Art 226 can be

(1) AIR 1968 AP 19

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permitted only where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction the petitioners are jointly interested in the cause or causes of action I would accordingly answer the two questions as below

Question 1—An application under Art 226 of the Constitution involving civil rights is a proceeding in a court of civil jurisdiction and as such the provisions of O 1, r 1, C P C would be applicable to such a proceeding but only to a limited extent, that is, the joinder of more than one person under Art 226 can be permitted only where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction the petitioners are jointly interested in the cause or causes of action

Question 2—In view of the answer given to question no I it does not arise

SAHGAL, J —I have had the advantage of going through the drafts of judgments prepared by my Lord the Chief Justice and the Hon'ble LAKSHMI PRASAD, J I agree generally with the view expressed by the Hon'ble LAKSHMI PRASAD, J but I would like to add a few lines of my own

The following two questions of law have been referred to the Full Bench

(1) Whether an application under Art 226 of the Constitution is a proceeding in a court of civil jurisdiction and as such the provision of O 1, r 1 of the Code of Civil Procedure would be applicable to such a proceeding

(2) If the answer to the first question is in the affirmative this should have been negative it being a case of clerical error—then whether persons more than one can join together in a petition under Art 226 of the Constitution in the circumstances in which persons more than one can join together as plaintiffs in a suit in accordance with the provisions of O 1 r 1 of the Code of Civil Procedure?

For the determination of the first question the provisions of s 141 of the Code of Civil Proceedure are relevant S 141 reads

> 141 The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any court of civil jurisdiction

As far back as the year 1894, the Privy Council in *Thakur Prasad* v *Fakur Ullah* (1) laid down with respect to s 647 of the Code of Civil Procedure then in force, which provision of law was equivalent to s 141 of the current Code, as follows

> Their Lordships think that the proceedings spoken of in s 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth, and do not include executions "

The question, therefore, to be decided is whether the proceedings before the court under Art 226 of the Constitution can be said to be the proceedings in any court of civil jurisdiction and, if so whether such proceedings can be said to be proceedings in original matters in the nature of suits

In *S A L Narayan Row* v *Ishwarlal Bhagwandas* (2) the Supreme Court held that proceedings before the

(1) I L R 27 All 108 (2) A I R 1965 S C 1618

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High Court on a petition under Art 226 in the matter of recovery of Income tax are civil proceedings within the meaning of Art 133(1)(c) A proceeding in which relief is claimed against action of revenue authorities is included in the civil proceedings and not in other proceedings It was pointed out that by a petition for a writ under Art 226 of the Constitution, extraordinary jurisdiction of the High Court to issue high prerogative writs granting relief in special cases to persons aggrieved by the exercise of authority—statutory or otherwise—by public officers or authorities is invoked This jurisdiction is undoubtedly special and exclusive but on that account the nature of the proceedings in which it is exercised is not altered Where a revenue authority seeks to levy tax or threatens action in purported exercise of powers conferred by an act relating to revenue, the primary impact of such an act or threat is on the civil rights of the party aggrieved and when relief is claimed in that behalf it is a civil proceeding even if relief is claimed not in a suit but by resort to the extraordinary jurisdiction of the High Court to issue writs

In *Ramesh* v *Gendalal Moti Lal Pathni* (1) the Supreme Court remarked that the term civil proceeding' has been held to include at least all proceedings affecting civil rights, which are not criminal The words civil proceedings' are used in widest sense in contradistinction to criminal proceedings which affect directly civil rights A proceeding under Art 226 for a writ to bring up a proceeding for consideration must be a civil proceeding if the original proceeding concerned civil rights At page 1449 the Supreme Court remarked

> "We are concerned here with the exercise of extraordinary original civil jurisdiction under

(1) AIR 1966 SC 1448

Art 226 Under that jurisdiction, the High Court does not hear an appeal or revision The High Court is moved to intervene and to bring before itself, the record of a case decided by or pending before a Court or tribunal or any authority within the High Court's jurisdiction'

It would thus appear that a proceeding under Art 226 before a Court if it relates to a civil matter is a civil proceeding and in deciding such a matter the High Court exercises extraordinary original civil jurisdiction The jurisdiction is not in execution it is not exercised by way of appeal The proceedings are in the nature of a suit as such s 141 of the Code of Civil Procedure applies There can in the circumstances be no manner of doubt that such proceedings are proceedings in a court of a civil jurisdiction within the meaning of that term under s 141 of the Code of Civil Procedure

In *Khurjawala Buckles Manufacturing Co v Commissioner, Sales Tax, U P* (1) it has however been held by a Division Bench of this Court that the provisions of Civil Procedure Code do not govern a proceeding under Art 226 of the Constitution It is pointed out therein that what is laid down in s 141 of the Civil Procedure Code is that the procedure laid down in the Code in regard to suits is to be followed so far as it can be in all proceedings in any court of civil jurisdiction A High Court when exercising jurisdiction under Art 226 according to the view expressed by that Bench cannot be held to be a court of civil jurisdiction That jurisdiction is not ordinary jurisdiction but it is extraordinary jurisdiction which means that it is neither civil nor criminal

This view with respect will no longer hold good in view of the two Supreme Court decisions referred to in

(1) A I R 1964 All 93

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above The jurisdiction may be extraordinary jurisdiction but that does not mean that it is not civil just as the ordinary jurisdiction of the High Court may either be civil or criminal the extraordinary jurisdiction as opposed to ordinary jurisdiction may also either be civil or criminal The classification into 'ordinary and "extraordinary jurisdiction is different from the classification between "civil and 'criminal' jurisdiction for both the civil and criminal jurisdiction may be ordinary or extraordinary The jurisdiction with respect to a petition under Art 226 of the Constitution may be extraordinary jurisdiction but if the impact of the decision is on the civil rights of a party it would be exercised under its civil jurisdiction, if its impact is on criminal rights it is exercised under its criminal jurisdiction

The jurisdiction that is exercised under Art 226 is neither appellate nor in the execution department It is an original jurisdiction and is in the nature of a suit and as such s 141 of the Code of Civil procedure will apply to it The conclusion, therefore is that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in such proceedings The provisions of O 1, r 1 shall thus be applicable to such proceedings in so far as they can be made applicable The words in so far as they can be made applicable are important The provisions of O 1, r 1 of the Code of Civil Procedure, therefore do apply to the proceedings under Art 226 of the Constitution before the court in civil matters only to the extent to which the nature of such proceedings permits that provision to be applied to them

The proceedings under Art 226 are of a summary nature Cases under Art 226 of the Constitution are decided mainly on affidavits The controversial questions of fact if they arise in such proceedings are as a

general rule with rare exceptions not decided in such proceedings and the parties are left to seek other appropriate remedies if such controversy arises In the nature of things, therefore the provisions of O 1 r 1 of the Code of Civil Procedure cannot be made applicable in their entirety in such proceedings The Civil Procedure Code itself provides a safeguard against this provision becoming embarrassing to the trial of a suit or causing delay in the trial While O 1, r 1 of the Code provides

> "All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative where if such persons brought separate suits any common question of law or fact would arise

R 2 of that Order provides

> 'Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient

Thus it would be seen that even in original suits in application of O 1 r 1 may embarrass or delay the trial of a suit and in such a case the court has been given power to order an election to be made by the plaintiff so that there may be separate trials in such matters

The proceedings under Art 226 being summary proceedings and having been provided to give effective and speedy remedy to a litigant there is all the more reason that the provisions of O 1 r 1 which may apply to such proceedings in view of the provisions of s 141

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of the Code of Civil Procedure should not be allowed to hamper the very purpose for which Art 226 existed The right to claim an appropriate writ which flows from the order affecting the claimant is essentially an individual right So it is not open to him to join in the petition other person or persons affected by similar orders in contradistinction to the same order for the simple reason that each of them has a remedy open to him and the quashing of one order does not necessarily render the other order null and void This rule is obviously calculated to remove great inconvenience which might otherwise result in issuing several writs, orders or directions in the nature of writ on a single omnibus petition relating to rights of several persons affected by distinct or separate orders The position in regard to joinder of persons more than one in a single petition has been considered in the case of *Annam Ishwarayana v State of Andhra Pradesh* (1) I am in respectful agreement with the relevant observations made in that case I would therefore, suggest the following answers to the two questions referred to the Full Bench

Q No 1 —An application under Art 226 of the Constitution is a proceeding in a court of civil jurisdiction if it relates to a civil matter and as such the provisions of O 1 r 1 of the Code of Civil Procedure do apply to such a proceeding but only to the extent they are not inconsistent with the nature of the proceeding Thus the joinder of more than one person under Art 226 can be permitted only where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transac-

(1) AIR 1966 Andh Pra 16

tion the petitioners are jointly interested in the cause or causes of action

Q No 2 —In view of the answer to question no 1, the second question does not arise.

BY THE COURT—Our answers to the two questions of law referred to the Full Bench are as follows

Question No 1 —An application under Art 226 of the Constitution is a proceeding in a court of civil jurisdiction if it relates to a civil matter, and as such the provisions of O 1 r 1 of the Code of Civil Procedure do apply to such a proceeding but only to the extent they are not inconsistent with the nature of the proceeding Thus the joinder of more than one person under Art 226 can be permitted only where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction the petitioners are jointly interested in the cause or causes of action

Question No 2 —In view of the answer to question no 1, the second question does not arise

Question answered

APPELLATE CIVIL

Before Hon'ble Mr. I. G. Oak, Chief Justice and Mr. Justice U. S. Srivastava *

RAM BEHARI SHUKLA APPELLANT

v.

MUNNA LAL SHUKLA AND OTHERS RESPONDENTS

1968

January, 18

U. P. Consolidation of Holdings Act, 1953, s. 5 (c)(ii)—*Sub-cl. (ii) of cl. (c) of s. 5 does not prohibit sale of the entire holding*

Sub-cl. (ii) of cl. (c) of s. 5 of the U. P. Consolidation of Holdings Act, 1953 as it stood after the amendment by U. P. Act VIII of 1963 does not prohibit sale of the entire holding. The words used in sub-cl. (ii) are

Any part of his holding

The entire holding cannot be described as a part of the holding.

Special Appeal No. 17 of 1966 against the judgment and order passed by Hon'ble Mr. Justice G. D. SAHGAL, dated 24th December, 1965 in W. P. No. 205 of 1965.

The facts appear in the judgment.

K. S. Verma and *S. C. Mathur*, for the Appellant.

M. L. Trivedi, for Respondent No. 1.

OAK, C. J.—This special appeal arises out of consolidation proceedings. During consolidation operations chak no. 26 was allotted to Jagat Narain Singh. On 25th May, 1964 Jagat Narain Singh executed a sale deed in favour of Munna Lal Shukla with respect to the

* While sitting at Lucknow.

entire holding comprised under chik no 26 Later Jagat Narain Singh executed another sale deed for the same property in favour of Ram Behari Shukla Relying on the sale deed dated 25th May 1964 in his favour, Munna Lal Shukla applied for mutation The application for mutation was dismissed by the Assistant Consolidation Officer That decision was upheld in appeal and in revision by the Settlement Officer (Consolidation) and the Deputy Director of Consolidation respectively Against these decisions of the consolidation authorities, a writ petition was filed in this Court by Munna Lal Shukla The writ petition has been allowed by a learned single Judge of this Court He quashed the orders of the three consolidation authorities, and directed that the application by Munna Lal Shukla for mutation should be disposed of in accordance with law Against that order of the learned single Judge the present special appeal has been filed by Ram Behari Shukla

The consolidation authorities declined to allow mutation in Munna Lal s favour on the ground that he had not obtained permission from the Settlement Officer (Consolidation) On the other hand, the learned single Judge of this Court has held that in the circumstances of the present case no such permission was needed The question for determination in the special appeal is, therefore, whether permission was needed to support the sale deed dated 25th May, 1964

The matter is governed by the provisions of the U P Consolidation of Holdings Act 1953, hereinafter referred to as the 'Act This Act has been amended from time to time The sale deed in question was executed in the year 1964 We are therefore, concerned with the Act as it stood after the amendment by U P Act VIII of 1963

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Section 5 of the Act describes the effect of a notification under s 4 of the Act Cl (c) of s 5 is

> Notwithstanding anything contained no tenure holder except with the permission in writing of the Settlement Officer Consolidation previously obtained shall—
>
> (i) use his holding or any part thereof for purposes not connected with agriculture, horticulture or animal husbandry including pisciculture and poultry farming, or
>
> (ii) transfer by way of sale gift or exchange any part of his holding in the consolidation area

The question is whether the sale deed dated 25th May 1961 falls within the prohibition of sub cl (ii) of cl (c) of s 5 of the Act The consolidation authorities thought that the sale deed did fall within the prohibition On the other hand the learned single Judge has held that the prohibition should be confined to the sale of a part of a holding and does not extend to a sale of the entire holding

A similar question came before this Court in *Natthi Singh* v *Kanchhidi* (1) In that case it was held by A P SRIVASTAVA J that it is not possible to accept the contention that though one or more plots of a Khata cannot be transferred the whole Khata can be transferred without such permission In that case the learned Judge had to consider the provision of s 16 A of the Act as it stood before the amendment by U P Act XXXVIII of 1958 The provision of s 16 A of the Act as it stood then is somewhat similar to the provision of sub cl (ii) of cl (c) of s 5 of the Act as it stands after its amendment by U P Act VIII of 1963

(1) 1963 R D (H C) 296

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In the present case the learned single Judge was aware of the broad position that when there is a prohibition against the transfer of any part of a holding, it should be construed to mean prohibition against a transfer of the whole holding But he considered that in view of the context of s 5(c) (ii), the prohibition should not be extended to the sale of the whole holding

The learned single Judge has given two reasons in support of his view He has pointed out that cl (c) of s 5 of the Act contains prohibitions of two kinds Sub cl (i) contains prohibition against use of a holding or a part of a holding for purposes not connected with agriculture etc Sub cl (ii) of cl (c) of s 5 of the Act contains a prohibition against sales etc of any part of a holding It is significant that the language used in sub cl (ii) is different from the language used in sub cl (i) In sub cl (i) the reference is to use of a holding or any part thereof On the other hand the words used in sub cl (ii) are

'sale any part of his holding'

If the legislature intended that the ban under sub-cl (ii) should be co extensive with the ban in sub cl (i) it was quite easy for the Legislature to use the expression holding or any part thereof as was done under sub clause (i) But the language of sub cl (ii) materially differs the language of sub cl (i)

Secondly, the learned single Judge has pointed out that in case a portion of a holding is transferred during consolidation operations, complications will arise, because the holding will then consist of two portions—one belonging to one tenure holder, the transferor, and the other belonging to another tenure holder, the transferee If the entire holding is transferred, it will not disturb consolidation operations because all that one has to do

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is to substitute the transferee's name in place of the transferor

In view of these considerations, the learned single Judge was justified in taking the view that sub cl (ii) of cl (*c*) of s 5, does not prohibit sale of the entire holding Sri *K S Verma* appearing for the appellant, invited us to place strict interpretation on sub cl (ii) We do not think that the rule of strict construction helps the appellant The words used in sub cl (ii) are

'Any part of his holding"

Strictly speaking, the entire holding cannot be described as a part of the holding So, on my view of the matter, the view taken by the learned single Judge appears to be correct

The appeal is dismissed with costs to respondent no 1

Appeal dismissed

APPELLATE CIVIL

*Before the Hon'ble V G Oak, Chief Justice and Mr Justice U S Srivastava**

THE TULSIPUR SUGAR COMPANY LIMITED

PLAINTIFF APPELLANT,

v

THE NOTIFIED AREA COMMITTEE, TULSIPUR

DEFENDANT RESPONDENT

1968

January 17

The U P Town Areas Act, 1914 s 3—*Declaration under* s 3(1)—*Nature of*—*Opportunity to residents of the locality to oppose, not necessary*—*such decision is conclusive proof that particular area is not an agricultural village*

A declaration by the State Government under sub-s (1) of s 3 of the U P Town Areas Act 1914 declaring particular area to be a Town Area is conclusive proof according to sub-s (2) of s 3 of its decision that particular area is not an agricultural village. Such a declaration is of administrative nature. Since the decision is of administrative nature it is not necessary for the State Government to give an opportunity to residents of the locality to oppose such a proposal. S 3 of the Act is valid.

Case law discussed.

S A No 462 of 1964 against the judgment and decree dated 28th September, 1964, passed by Sri S P Srivastava, Civil Judge, Gonda in Civil Appeal No 2 of 1963.

The facts appear in the judgment.

Bishun Singh, for the Appellant.

Raj Kumar Srivastava, for the Respondent.

OAK, C J —This second appeal by a plaintiff arises out of a suit for permanent injunction. The Tulsipur Sugar Company Limited filed a suit against the Town

* While sitting at Lucknow

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THE TULSIPUR SUGAR COMPANY TULSIPUR
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Oak C J

Area Committee, Tulsipur, on the following allegations

The plaintiff is a joint stock company carrying on the business of manufacturing and selling sugar at the Sugar Factory at Tulsipur The factory is situate within the agricultural village of Shitalapur, district Gonda The plaintiff has to import stores and materials for the purposes of the factory In the year 1955 a notification under s 3 of the U P Town Areas Act, hereinafter referred to as the Act, was issued establishing a Town Area at Tulsipur The notification under s 3 of the Act is void and has no legal effect In the year 1959 the authorities took certain steps to introduce octroi duty for the Town Area A series of notifications were published in 1959 and 1960 on this subject These notifications also are invalid The result is that no octroi duty is in force within the Town Area Further, the plaintiff in particular is not liable to pay any octroi duty But the defendant has been interfering with the plaintiff's business The defendant has been claiming octroi dues from the plaintiff This demand is illegal The plaintiff therefore brought the suit for permanant injunction to restrain the defendant from interfering with the carrying of goods, etc by the plaintiff There was also a prayer to restrain the defendant from levying or collecting any octroi dues from the plaintiff at the plaintiff's sugar factory

The plaintiff's claim was opposed by the defendant It was pleaded that the notification under s 3 of the Act is valid, and the Town Area was validly established at Tulsipur The defendant also supported the various notifications issued in 1959 and 1960, and pleaded that octroi duty had been legally imposed within the Town Area During the pendency of the suit the Town Area Committee was converted into Notified Area Commit

tee The Notified Area Committee was accordingly substituted as defendant in the suit

The case was tried by the Munsif Utraula at Gonda He upheld the plaintiff s claim that the notification under s 3 of the Act is invalid, and so are the notifications issued in the years 1959 and 1960 imposing octroi duty On these findings, the plaintiff s claim for permanent injunction was decreed by the trial court The defendant appealed The appeal was allowed by the Civil Judge, Gonda He upheld the validity of the impugned notifications and declaration In the result the plaintiff s suit was dismissed

The plaintiff has therefore, come to this Court in second appeal When this appeal came up before a learned Judge of this Court, he considered that the appeal involves certain important questions of law He therefore, referred the case to a larger Bench

The contentions of Sri *Bishun Singh* appearing for the plaintiff appellant may be divided into two parts Firstly he challenged the notification under s 3 of the Act S 3 of the Act states

> The State Government may by notification in the Official Gazette---
>
> (*a*) declare any town, village, suburb, bazar or inhabited place to be a town area for the purposes of this Act,
>
> (*b*)
>
> (*c*)
>
> (*d*)
>
> Provided that an agricultural village shall not be declared or included within the limits of a town area
>
> (2) The decision of the State Government that any inhabited area is not an agricultural village

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within the meaning of the proviso to sub s (1) of this section shall be final and conclusive, and the publication in the official *Gazette* of a notification declaring such area to be a town area or within the limits of a town area shall be conclusive proof of such decision

On 22nd August, 1965 the State Government issued a notification under s 3 of the Act establishing a Town Area at Tulsipur The notification was published in the *Uttar Pradesh Gazette*, dated 27th August 1955 This notification has been challenged by the plaintiff on a variety of grounds

Sri *Bishan Singh* pointed out that under the proviso to sub s (1) of s 3 of the Act an agricultural village cannot be declared to be a Town Area The plaintiff's case is that the plaintiff's factory lies within Shitalapur, which is an agricultural village On page 48 of the paper book it was recorded in the judgment of the trial court

> Admittedly plaintiff's sugar factory is situate in agricultural village Shitlapur

Apart from this observation in the judgment of the trial court, we do not find any such admission by the defendant On the contrary it is stated in para 1 of the written statement that it is wrong that the factory is situated in any agricultural village In view of this clear allegation in the written statement it could not be said that it was an admitted fact that the plaintiff's sugar factory is situated within an agricultural village

It is true that it is not permissible to declare an agricultural village a Town Area But the question remains whether Shitlapur is an agricultural village at all According to sub s (2) of s 3 this was a question to be decided by the State Government It is further

mentioned in sub s (2) that a notification declaring such area to be a Town Area shall be conclusive proof of such decision There has been a declaration by the State Government declaring this area to be a Town Area Such a declaration according to sub s (2) of s 3 of the Act is conclusive proof of a decision by the State Government to the effect that this is not an agricultural village

Sri *Bishun Singh* attacked the decision by the State Government on the ground that no opportunity was given to the local residents before arriving at such a decision It was urged by the appellant s counsel that the decision contemplated by sub s (2) of s 3 of the Act is a quasi judicial decision Consequently, it was obligatory upon the State Government to give an opportunity to the local residents

In *Secretary of State* v *Mask & Co* (1) it was held that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied Even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure

The same view was taken by the Supreme Court in *Firm of Illuri Subbayya Chetty & Sons* v *State of Andhra Pradesh* (2)

It was further urged by Sri *Bishun Singh* that sub s (2) of s 3 of the Act is invalid because the provision confers arbitrary power on the State Government Reliance was placed upon *Messrs Dwarka Prasad Laxmi Narain* v *State of Uttar Pradesh* (3) In that case the

(1) A I R 1940 P C 105 (2) A I R 1964 S C 322
(3) A I R 1954 S C 224

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Court noticed that under cl 3(1) of the U P Coal Control Order 1953 no person shall stock sell store for sale or utilise coal for burning bricks or shall otherwise dispose of coal in this State except under a licence granted under the Order It was held by the Supreme Court that cl 3(1) confers an unrestricted power on the State Controller to make exemptions That clause was consequently unreasonable

In *Dwarka Nath* v *Income Tax Officer* (1) the Court explained the distinction between an administrative act and a quasi judicial act A writ of *certiorari* can be issued only to quash judicial or quasi judicial act Before such a writ can be issued the following conditions have to be complied with

> (1) the body of persons must have legal authority,
>
> (2) there must be authority to determine questions affecting the rights of subjects, and
>
> (3) the body of persons should have a duty to act judicially

The provisions of a statute may enjoin on an administrative authority to act administratively or judicially If it expressly imposes a duty on the administrative body to act judicially, it is a clear case of a judicial act But the act may not expressly confer a duty to act judicially but this duty may be inferred from the provisions of the statute It may be gathered from the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used the nature of the power conferred of the duty imposed on the authority and other indicia afforded by the statute

(1) AIR 1966 SC 81

A duty to act judicially may arise in widely different circumstances and a hard and fast rule or an inflexible rule of guidance, is neither possible nor advisable to be laid down

We may examine the provisions of s 3 of the Act on the principle laid down by the Supreme Court in *Dwarka Nath's* case (1) Sub s (1) of s 3 enables the State Government to declare an area as a Town Area Under s 3 the State Government has to decide whether a particular area consists of an agricultural village or not When an area is declared as a Town Area, the specific rights of residents are adversely affected may be that in due course of time taxes would be imposed, and residents of the locality may have to pay such taxes But it cannot be said that a mere declaration of a Town Area with respect to a specified area directly affects the rights of the residents of the locality Such a declaration is of administrative nature Since the decision is of administrative nature, it is not necessary for the State Government to give an opportunity to residents of the locality to oppose such a proposal In our opinion, s 3 of the Act is valid It follows that the notification dated 22nd August, 1955 declaring the particular area as a Town Area is valid

The second part of the argument of Sri *Bishun Singh* concerns the validity of the notifications for imposing octroi duty For appreciating this part of the argument, it is necessary to examine the provisions of the Act for imposing taxes S 15 A provides for preliminary proposals for taxes The Committee has to prepare a draft of the rules Such draft rules have to be published It is open to inhabitants of the Town Area to file objections Such objections have to be considered by the Committee In the light of such objections,

(1) AIR 1954 SC 224

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So, the failure of the authorities to define the limits again in 1959 was not likely to prejudice the residents of the locality. It was open to all the residents of the Town Area to lodge objections against the draft rules.

S. 15 C of the Act lays down the procedure for altering taxes. S. 15 C states:

> 'The provisions of ss. 15 A and 15 B shall, as far as may be, apply for altering or abolishing tax already imposed under this Act.'

Relying on s. 15 C of the Act Sri *Bishun Singh* urged that if it was proposed to amend the notification issued in October, 1959, the authorities should have repeated all the steps laid down in ss. 15 A and 15 B of the Act. S. 15 C provides for a situation where it is proposed to alter or abolish a tax. In the instant case there was no proposal to alter or abolish a tax. All that the notification dated 14th April, 1960, did was to give the limits of the Town Area. Limits of the Town Area were not being fixed for the first time. The limits specified in the notification dated 14th April, 1960 were the same as were specified in the notification dated 22nd August, 1955. So the notification dated 14th April, 1960 cannot be treated as an amendment in the true sense. It was merely a clarification of the notification issued in October 1959. A clarification of this kind did not attract s. 15 C of the Act.

It was also urged by Sri *Bishun Singh* that it was not permissible to issue such notifications piecemeal. As explained above, the notification dated 14th April, 1960 was merely a clarification of the earlier notifications issued in October and December 1959. This was not a case of action being taken piecemeal.

Lastly, it was urged for the appellant that no notification was issued as required by sub-s. (3) of s. 15 B of

the Act On the one hand, there is no such allegation in the plaint On the other hand, the written statement does not refer to any such notification Since there was no such plea in the plaint, we are not called upon to decide whether such a notification was ever issued

All the contention advanced on behalf of the plaintiff appellant against the notification dated 22nd August 1955 and the various notifications issued in 1959 and 1960 fail The plaintiff's claim was, therefore, rightly dismissed by the learned Civil Judge, Gonda

The second appeal is dismissed with costs The interim injunction is vacated

Appeal dismissed

CIVIL MISCELLANEOUS

*Before Mr Justice G D Sahai**

THE U P SHIA CENTRAL BOARD OF WAQF, LUCKNOW PETITIONER,

1968
January 23

v

NAWAB SULTAN ALI KHAN AND ANOTHER OPPOSITE PARTIES

U P Muslim Waqfs Act, 1960 s 71 s 72(1) *and Code of Civil Procedure 1908 O XXXIX—Stay—Jurisdiction of Tribunal to grant stay*

The Constitution of India (1950) Art 226—*Interference under—If the Tribunal has not acted in excess of its jurisdiction*

S 71 provides that the mere pendency of a dispute question or matter before a Tribunal will not have the effect of staying or suspending any proceedings before the Board It follows that if the Tribunal finds some good cause for suspending proceedings before the Board it can do so under the provisions of O XXXIX of the Code of Civil Procedure The jurisdiction of the Tribunal to grant the stay under the Code of Civil Procedure is not barred though the Tribunal will not exercise that jurisdiction and grant the stay only on the ground that a dispute has arisen before it in the matter

If a Tribunal has jurisdiction it has jurisdiction to pass an order rightly or wrongly and the High Court will not interfere under Art 226 of the Constitution if the Tribunal has not acted in excess of its jurisdiction

Writ Petition No 579 of 1966 under Art 226 of the Constitution of India

The facts appear in the judgment

Syed Ghulam Imam, for the Petitioner

S Rahman and *S Mirza*, for the Opposite Party No 1

* While sitting at Lucknow

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SAHGAL, J. —This is a petition under Art. 226 of the Constitution praying that a certain order of injunction passed by opposite party no. 2 Civil Judge of Lucknow acting as a Tribunal under s. 70 of the Uttar Pradesh Muslim Waqfs Act 1960 be quashed by a writ of *certiorari*.

Smt. Shahanshah Begum created a Waqf and under that waqf appointed a Committee of Management of which opposite party no. 1 was the Secretary. He was also described as the Managing Trustee of the Committee. The U. P. Shia Central Board of Waqfs purporting to exercise power under s. 63 of the Uttar Pradesh Muslim Waqfs Act 1960 removed the Committee of Management and also opposite party no. 1. Opposite party no. 1 was dissatisfied with the order of the U. P. Shia Central Board of Waqfs the petitioner and he made a reference before the Tribunal at Lucknow (the Civil Judge of Lucknow) the Tribunal being constituted under s. 70 of the Act challenging the validity of his removal. The reference was registered before the Tribunal. An application was moved during the pendency of the reference by opposite party no. 1 before the Tribunal praying for a temporary injunction directing the petitioner not to interfere with the possession and management of the Trust by opposite party no. 1 and his deputy in any shape or manner till the disposal of the reference. The injunction prayed for has been granted by the Tribunal by an order dated the 6th of September 1966 a copy of which is Annexure (1a) to the petition. It is in these circumstances that the U. P. Shia Central Board of Waqfs has come to this Court praying for the quashing of that order by a writ of *certiorari*.

The contention on behalf of the petitioner is that under the proviso to s. 71 of the Waqfs Act the Tribunal

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had no jurisdiction to grant the temporary injunction prayed for

In order to appreciate the arguments advanced by the learned counsel the relevant provisions of ss 71 and 72 of the Act have to be looked into S 71 reads

> '71 Any dispute, question or matter which may under this Act be referred to a Tribunal, shall be referred to a Tribunal having jurisdiction over the area in which the property to which such dispute, question or matter relates is situate or if such property is situate in areas under the jurisdiction of more than one Tribunal then to any of them, and the Tribunal of competent jurisdiction shall adjudicate upon such dispute question or matter in accordance with the provisions of this Act
>
> Provided that no proceedings under this Act in respect of any Waqf shall be stayed or suspended merely by reason of the pendency of any such dispute, question or matter before a Tribunal

The provisions of the Code of Civil Procedure have been made applicable to the proceedings before the Tribunal in the following terms under s 72(1) of the Waqfs Act

> '72(1) Subject to the provisions of this Act and any rules that may be made in this behalf, a Tribunal shall follow the same procedure as is provided in the Code of Civil Procedure, 1908, in regard to suits

The contention on behalf of the petitioner is that, no doubt the provisions of the Code of Civil Procedure apply to a case arising out of a reference before the Tribunal, but their application is subject to the pro

visions of the Waqfs Act itself and as under the proviso to s 71 of the Waqfs Act the issuing of the injunction of the type that has been granted in the case, is barred, that provision will prevail over the provision relating to the applicability of the provisions of the Code of Civil Procedure to the proceedings arising out of the reference This contention, to my mind, is not well founded What the proviso to s 71 lays down is that no proceedings under the Waqfs Act in respect of any Waqf shall be stayed or suspended merely by reason of the pendency of any such dispute, question or matter before a Tribunal The word 'merely' indicates that simply because a dispute is pending before a Tribunal arising out of a reference made to it, it will not necessarily mean that proceedings under the Act in respect of the Waqf in connection with which reference has been made, shall be stayed In other words, what s 71 provides is that the mere pendency of a dispute, question or matter before a Tribunal will not have the effect of staying or suspending proceedings before the Board It follows that if the Tribunal finds some good cause for suspending proceedings before the Board it can do so under the provisions of O XXXIX of the Code of Civil Procedure The jurisdiction of the Tribunal to grant the stay under the Code of Civil Procedure is not barred though the Tribunal will not exercise that jurisdiction and grant the stay only on the ground that a dispute has arisen before it in the matter

In the instant case, the Tribunal has gone into the merits of the case and has come to that conclusion that the balance of convenience demands that the injunction prayed for should be granted It has acted within its jurisdiction and not in excess of it and as such no *certiorari* can issue

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The learned counsel urged that if the Tribunals are allowed to issue injunctions in such cases then the very purpose of giving power to the Waqf Board under s 69 of the Act of suspending a committee or any authority under the Waqf will be frustrated That is a matter about the merits of the order that may be passed in such cases This point does not go to the root of the jurisdiction If a Tribunal has jurisdiction, it has jurisdiction to pass an order rightly or wrongly and this Court will not interfere under Art 226 of the Constitution if the Tribunal has not acted in excess of its jurisdiction

No other point has been pressed before me

The petition has no force and is hereby dismissed with costs

Petition dismissed